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No. 3039

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1122

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant in Error.

Transcript of Record

**Upon Appeal from the United States District
Court for the District of Montana.**

FILED

OCT 11 1917

F. D. MONCKTON,
CLERK.

No.

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Circuit Court of Appeals
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UNITED STATES OF AMERICA,

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Names and Addresses of Attorneys of Record

BURTON K. WHEELER, United States Attorney,
JAMES H. BALDWIN, Assistant U. S. Attorney,
Butte, Montana.

HOMER G. MURPHY, Assistant U. S. Attorney,
Helena, Montana.

Attorneys for Plaintiff in Error.

C. B. NOLAN and WILLIAM SCALLON, Helena,
Montana.

Attorneys for Defendant in Error.

*In the District Court of the United States for the
District of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

No. 506

BE IT REMEMBERED, that on the 3rd day of
May, 1916, the United States of America filed its
complaint herein, which said complaint is in the
words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the said defendant, Ash Sheep Company, now is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the state and district of Montana, and in carrying on and conducting all such business and operations as are necessarily incident to and connected with the buying and selling sheep and other livestock in the state and district of Montana.

II.

That on or about the 12th day of August, 1868, the plaintiff and the Crow tribe of Indians entered into, concluded and there was promulgated a treaty by which the United States of America set aside for the occupancy, use and benefit of said Crow tribe of Indians certain lands included within the boundaries of that certain reservation within the state and district of Montana which has since been and is now known and designated as the Crow Indian Reservation.

III.

That during all of the times hereinafter men-

tioned the plaintiff was and now is the owner of and entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation, and a part thereof, in the state and district of Montana, and described as follows, to wit: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12) township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east, Montana principal meridian.

IV.

That the lands hereinbefore described are a part of the lands included within the boundaries of the said Crow Indian Reservation opened to settlement and entry by the Act of the Congress of the United States entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation, in Montana, and making appropriation to carry the same into effect," approved April 27th, 1904, (33 Stat. L. 352), and that said lands, and all thereof, were at all of the times hereinafter mentioned, vacant lands upon which no settlements, entries or allotments of any kind had been made, and that the Indian title to the same had not been extinguished.

V.

That on or about the 14th day of July, 1913, the exact date thereof being now unknown to plaintiff and for that reason not more definitely

alleged, the defendant, Ash Sheep Company, in violation of the provisions of section 2117 of the Revised Statutes of the United States, and without the consent or permission of the Crow tribe of Indians, or of the United States, drove, ranged, fed and grazed, and caused to be driven, ranged, fed and grazed upon the tracts of land hereinbefore described, and upon other vacant lands included within the boundaries of said Crow Indian Reservation and opened to settlement and entry by the aforesaid Act of April 27th, 1904, a more particular description of said lands being at this time to plaintiff unknown, a large number of sheep, to-wit, about seven thousand one hundred (7,100) head, and which seven thousand one hundred (7,100) head of sheep were thereafter, for a long period of time, by the said defendant, Ash Sheep Company, ranged, fed and grazed upon said lands.

VI.

That under the provisions of section 2117 Revised Statutes of the United States the plaintiff is entitled to recover from the said defendant Ash Sheep Company, for the use and benefit of said Crow tribe of Indians, a penalty of one dollar for each of said seven thousand one hundred (7,100) head of sheep, so driven, ranged, fed and grazed upon the said lands by said defendant, Ash Sheep Company, as hereinbefore set forth, and amounting in all to the sum of seven thousand one hundred dollars (\$7,100).

WHEREFORE plaintiff prays judgment

against said defendant Ash Sheep Company for the sum of seven thousand one hundred dollars (\$7,100), as a penalty as hereinbefore set forth, and for costs of suit herein expended.

B. K. WHEELER,

United States Attorney District of Montana.

HOMER G. MURPHY,

FRANK WOODY,

Assistant U. S. Attorney District of Montana.

United States of America,

District of Montana,—ss.

Frank Woody, being first duly sworn according to law, deposes and says, that he is a duly appointed, qualified and acting Assistant United States Attorney for the district of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

FRANK WOODY.

Subscribed and sworn to before me this 3rd day of May, 1916.

GEO. W. SPROULE,

Clerk U. S. District Court, District of Montana.

By HARRY H. WALKER,

Deputy.

[Indorsed]: Title of Court and Cause. Complaint. Filed May 3, 1916. Geo. W. Sproule, Clerk, by Harry H. Walker, Deputy.

And thereafter, to-wit, on the 3rd day of May, 1916, summons was duly issued herein, and there-

after duly served upon the defendant, said summons and return thereon being in the words and figures following, to-wit:

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant,

Action brought in the said District Court and the complaint filed in the office of the Clerk of said District Court in the City of Helena, County of Lewis and Clark.

The President of the United States of America,
Greeting: To the Above Named Defendant, Ash Sheep Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS, the Honorable GEO. M. BOURQUIN,
Judge of the United States District Court, District of Montana this 3rd day of May in the year of our

Lord one thousand nine hundred and 16 and of our Independence the 140.

[Seal]

GEO. W. SPROULE,

Clerk.

By HARRY H. WALKER,

Deputy Clerk.

United States Marshal's Office,
District of Montana.

I HEREBY CERTIFY, that I received the within summons on the 4th day of May, 1916, and personally served the same on the 5th day of May, 1916, on the Ash Sheep Company by delivery to, and leaving with Christian Yegen, President of said defendants named therein personally, at Billings, County of Yellowstone, in said district, a certified copy thereof, together with a copy of the Complaint, certified to by Geo. W. Sproule attached thereto.

Dated this 6th day of May, 1916.

JOS. L. ASBRIDGE,

U. S. Marshal.

By A. G. SATHRE,

Deputy.

[Indorsed]: Title of Court and Cause. Summons. B. K. Wheeler, U. S. Atty., Butte, Montana, Plaintiff's Attorney. Filed May 6th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to-wit, on May 25th, 1916, defendant served and filed its demurrer to said com-

plaint herein, which is in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Demurrer.

Now comes the defendant and demurs to the plaintiff's complaint, and for cause of demurrer says. that said complaint does not state facts sufficient to constitute a cause of action.

C. B. NOLAN,

WM. SCALLON,

Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Demurrer. Filed May 25, 1916. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on June 15th, 1916, the court made and entered herein its order in words and figures following, to-wit:

*In the District Court of the United States in and for
the District of Montana.*

NO. 506,

UNITED STATES vs. ASH SHEEP CO.

On motion of C. B. Nolan, Esq., it is ordered that defendant may withdraw its demurrer herein and file an answer. Thereupon answer was filed.

Entered in open court June 15, 1916.

GEO. W. SPROULE, Clerk.

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Answer.

Now comes the defendant above named, and for answer to plaintiff's complaint, admits, alleges, and denies as follows:

I.

Admits the allegations of paragraph I, except that it denies that it is now engaged in the business alleged, or in any business whatsoever.

II.

Admits the allegations of paragraphs II, III and IV, except that as to the allegations of paragraph IV, that the Indian title to the lands had not been extinguished, and as to that allegation, defendant has no knowledge or information sufficient to form a belief and denies the same.

III.

Denies the allegations of paragraph V, except as hereinafter qualified.

IV.

Denies the allegations of paragraph VI.

FURTHER ANSWERING SAID COMPLAINT,
DEFENDANT ALLEGES:

I.

That at the time stated in plaintiff's complaint, the defendant, Ash Sheep Company, was engaged in the sheep business, and at said time owned and ran several bands of sheep, and at the time stated owned approximately the number of head of sheep stated in plaintiff's complaint, and that the sheep so owned by it were in separate bands, and were run and handled by sheep herders in its employ.

II.

That the lands mentioned in paragraphs III and V of plaintiff's complaint were originally within the Crow Indian Reservation and were lands to which the Act of Congress, mentioned in paragraph IV of plaintiff's complaint applied.

III.

That pursuant to the said Act of Congress, to which reference is made in plaintiff's complaint, and pursuant to the proclamation of the President of the United States made and issued in conformity with said Act of Congress, certain of the lands so ceded and affected by said Act of Congress and by said proclamation were settled on by settlers, and title thereto acquired by said settlers, and that the settlements so made were promiscuously scattered over the entire tract of land so ceded as aforesaid, and that such lands so settled on were in the private ownership of said settlers, or their

grantees at the time mentioned in plaintiff's complaint.

IV.

That on the 14th day of July, 1913, and for a long time prior thereto and subsequent thereto, this answering defendant owned in said ceded strip, large tracts of land, of the title to which, the United States had been divested, and, likewise, at said time was entitled to the use of large tracts of land in said ceded strip as lessee from those to whom title had passed from the United States, pursuant to law, providing for the settlement on said strip, and the disposal of same, and that the said lands so owned and leased by it consisted of several thousand acres in separate tracts and bodies, and the said lands so owned and leased by it were in close proximity to the lands mentioned in paragraphs III and V of plaintiff's complaint, and on said lands so owned and leased by it, it herded and grazed some of the sheep owned by it.

V.

Defendant further avers that in getting its sheep onto those lands so leased and owned by it and onto its said holdings, between three and four thousand head of its sheep were driven across the lands described in plaintiff's complaint for the purpose of being taken to the lands owned and leased by it, as aforesaid, and in being thus driven, the said sheep grazed upon the lands mentioned in plaintiff's complaint, and in that connection, defendant alleges that the lands mentioned in

plaintiff's complaint were so situate with reference to the lands owned and leased by it, as aforesaid, it would be impossible for the defendant to use its said lands, and it would be impossible for it to herd its sheep on its own holdings, as aforesaid, without such sheep being driven to and across some of the lands mentioned in plaintiff's complaint.

AND FOR A FURTHER DEFENSE TO PLAINTIFF'S COMPLAINT, DEFENDANT ALLEGES:

I.

That on the 11th day of August, 1913, the plaintiff filed its complaint in the above entitled court against the defendant, copy of which complaint is hereto attached, marked Exhibit "A," and made a part hereof;

II.

That on the 25th day of August, 1913, the defendant filed its Answer to said complaint, copy of which Answer is hereto attached, marked exhibit B and made a part hereof.

III.

That the relief prayed for by said plaintiff in said action is the same relief that is prayed for in the present action; that the wrong complained of in said action is the wrong complained of in the present action; that the damage item of seventy-one hundred dollars (\$7100.00), sought to be recovered in said action is the penalty which plaintiff is now seeking to enforce in the present action.

IV.

Defendant further avers that issue was joined in said action, and such proceedings were thereafter had therein that said cause came on for trial in the above entitled court, and the said cause was tried in said court upon the 17th day of December, 1913, to the judge of said court without a jury, and it was considered by said court in said action as to whether or not the plaintiff was entitled to recover the penalty which it is now seeking to recover in the present action; that the said cause was submitted to said court for the determination, and in said cause conclusions of law were made by said court, a copy of which conclusions of law is hereto attached marked Exhibit "C" and made a part of this answer.

V.

That thereafter, on, to-wit, the 10th day of February, 1916, a judgment and decree was duly made and entered in said action, copy of which said judgment and decree is hereto attached, marked Exhibit "D" and made a part hereof.

VI.

That said judgment still remains in full force and effect and stands unappealed from.

VII.

Defendant further alleges that plaintiff having instituted said action, and having sought to recover damages in said action, it elected to secure the relief which it was entitled to on account of the trespass complained of, which is the trespass

complained of in the present action, and having so elected to recover the damages which is sought to recover in said action, and having recovered damages for said trespass in said action, it ought now to be estopped from maintaining the present action.

WHEREFORE, defendant prays for judgment in its favor and for the dismissal of the complaint herein, and for costs of suit.

C. B. NOLAN,
WM. SCALLON,

Attorneys for Defendant.

State of Montana,
County of Lewis and Clark,—ss.

C. B. Nolan being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the defendant named in the foregoing entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief;

That affiant makes this affidavit and verification for and on behalf of said defendant, for the reason that said defendant is a corporation, and none of the officers of said defendant are within the County of Lewis and Clark, State of Montana, where affiant now is and resides and where this affidavit is made.

C. B. NOLAN.

Subscribed and sworn to before me this 3rd day of June, 1916.

[Notary Seal]

J. R. WINE, Jr.,

Notary Public for the State of Montana; Residing
at Helena, Montana. My Commission Expires
Nov. 17, 1917.

EXHIBIT "A."

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Bill of Complaint

To the Judge of the District Court of the United
States, District of Montana:

The United States of America, by James W. Freeman, United States Attorney for the District of Montana, under authority and by the direction of the Attorney General, brings this bill of complaint against the Ash Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and by reason thereof a citizen and resident of said State and District of Montana; and thereupon shows unto your Honor:

1. That the said defendant, the Ash Sheep Company, at all the times hereinafter mentioned, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and

selling of sheep and other livestock in the State and District of Montana, and carrying on and conducting all such business and operations as are necessarily incident to the buying and selling of sheep in the State and District of Montana.

2. That on or about the 12th day of August, 1868, this complainant and the Crow tribe of Indians entered into, concluded and then and there was promulgated a treaty by which the United States of America set aside for the use and benefit of the said Crow tribe of Indians that certain reservation within the State and District of Montana, which has since been and now is known as the Crow Indian Reservation.

3. That during all of the times hereinafter mentioned this complainant was and now is the owner and lawfully entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation and a part thereof, in the State and District of Montana, and described as follows: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana principal meridian. That all of said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana.

4. That the lands hereinabove described are a part of the vacant ceded Indian lands of the said Crow tribe of Indians and that the Indian title to the same has not been extinguished and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27th, 1904 (33 statutes at Large, page 352), entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation in Montana, and making appropriation to carry the same into effect.

5. That on or about the 14th day of July, 1913, the exact date thereof being now unknown to complainant and for that reason not more definitely alleged, and ever since said date, this defendant, the Ash Sheep Company, in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid, grazed and caused to be grazed upon the tracts of land hereinabove described, and other vacant ceded Indian lands reserved for the use and benefit of said Indians, and subject to the rules and regulations and Act of Congress hereinabove referred to, a more particular description of said lands is now to complainant unknown, a large number of sheep, to-wit, about seven thousand one hundred (7,100) head; that the said sheep are being grazed, and are now trespassing in and upon

the respective tracts of land hereinabove described; that the defendant company, acting by and through its agents, servants and employees, has not obtained authority or any permit whatsoever to graze and cause to be grazed said sheep in and upon the land hereinabove specifically described, as provided by the rules and regulations of the Department of the Interior of the United States, or any other officials of the complainant thereunto duly authorized.

6. And complainant further avers that grazing permits have been duly and regularly issued by its duly authorized agents to certain persons authorizing and permitting said persons to graze their stock, to wit, horses and cattle, upon all of the lands hereinabove described; that said persons to whom permits have been issued have complied with all the rules and regulations made and promulgated by the Secretary of the Interior in that regard and have paid all fees required thereunder.

7. Complainant further avers that the said defendant, the Ash Sheep Company, acting through its officers, agents, servants and employees, are now grazing and will continue to graze said seven thousand one hundred head of sheep in and upon the lands hereinabove referred to unless restrained by this court; that such action on the part of said defendant company and its agents, servants and employees constitutes a continuing trespass and will materially injure and destroy the use and value of said lands and cause irreparable

damage to this complainant, and deprive the Crow Indians of the benefits thereof; and that unless restrained by this Honorable Court the defendant, in defiance of the express mandate of the law so enacted by the Congress of the United States, will continue to graze said seven thousand one hundred head of sheep without due and lawful authority therefor first had and obtained, and said defendant now claims to have the right to so maintain said sheep in and upon said lands so held by the United States of America for the use and benefit of the Crow Indian nation, and will thereby prevent and prohibit the United States from asserting any right whatsoever in said lands.

8. That the said defendant, the Ash Sheep Company, in all of its operations hereinbefore described, has been and will act through divers of its officers, agents and employees; that the names of said officers, agents, servants and employees are to this complainant unknown and for that reason they are not made parties to this cause in their own individual names. Complainant avers, however, that unless such officers, agents, servants and employees of the said defendant are likewise restrained by an order of this Court, they will continue to trespass upon said lands, as aforesaid, and this complainant will, when the names of said officers, agents, servants and employees shall be ascertained, ask this Honorable Court permission to enjoin said officers, agents, servants and employees as party defendants in this cause. That

in consequence of the said acts of defendant company, complainant and the said Crow Indians herein have been and are being deprived of the benefit of said lands and premises, and complainant alleges that by reason thereof the said Crow Indians and this complainant as hereinbefore set forth have sustained damages in the sum of seven thousand one hundred dollars (\$7,100).

All of which actions, doings and pretenses of the said defendant and its said officers, agents, servants and employees are contrary to equity and good conscience and tend to the manifest injury and oppression of complainant in the premises

WHEREFORE, forasmuch as complainant is remediless in the premises according to the strict rule of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant, the Ash Sheep Company, may full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged, but not on oath (its answer on oath being hereby expressly waived), as fully and particularly as if the same were here repeated and it thereunto distinctly interrogated; that the said defendant, the Ash Sheep Company and its officers, agents, servants and employees, during the progress of this cause and thereafter finally and perpetually may be enjoined from so grazing said seven thousand

one hundred head of sheep on and upon said lands so described, and from occupying, using and trespassing on and upon said lands without having first obtained due and proper permission or authority from the Secretary of the Interior of the United States of America, and that the said defendant, its officers, and agents, be enjoined from employing or contracting with any individual, individuals, corporation or corporations not connected with or in the employ of said defendant from continuing the trespass hereinabove complained of, and from entering upon or going on the said lands, and that the said complainant may have and recover from said defendant the sum of seven thousand one hundred dollars (\$7,100) damages; and that the said complainant may have such other and further relief in the premises as may be considered just in this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto this complainant a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court directed to the said defendant, the Ash Sheep Company, thereby commanding it at a certain time and under a certain penalty therein to be limited to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made

against it in the premises, as shall seem fit and meet and agreeable to equity.

JAMES W. FREEMAN,

United States Attorney, District of Montana.
United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN,.

Subscribed and sworn to before me this 11th day of August, A. D. 1913.

[Seal]

GEO. W. SPROULE,

Clerk.

EXHIBIT "B."

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY,

Defendant.

Answer.

Now comes the defendant and for answer to complainant's bill of complaint:

I.

Admits the allegations of paragraphs one and two.

II.

Admits the allegations of paragraph three, except that it denies that the lands referred to in said paragraph are reserve lands, and denies that the said lands are set aside by the United States for the use and benefit of the Crow Indians. In that connection, it alleges that the lands in question were ceded to the United States by the said tribe, and that said lands are a portion of the public domain of the United States; the said tribe having no claim thereto, except that the proceeds from the disposition of said lands, to the extent provided for in the treaty and act of Congress providing for their cession shall be turned over to said tribe.

III.

Answering the allegations of paragraph four, admits that the lands referred to in said paragraph were part of the said Indian lands, but denies that the Indian title has not been extinguished, and denies that the said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior, in so far as the rules and regulations referred to provide that permits to said lands shall be granted for rentals provided, and the rentals so provided turned over to the Crow Indians. In that connection defendant alleges that said lands are public lands of the United

States and that the Indian title to same has been extinguished.

IV.

Answering the allegations of paragraph five, admits that sheep belonging to defendant, to the number specified in the bill of complaint, graze on the tracts of land described, but denies that the lands upon which they graze were reserved for the use and benefit of the Indians, and denies that the use of said lands is subject to the rules and regulations of the Indian Department, and denies that so grazing any trespass was committed.

Admits, however, that no permit to graze said sheep on said land, pursuant to the rules and regulations of the Interior Department was obtained. In that connection, however, defendant alleges that the lands in question were public lands of the United States, and that pursuant to the policy of the Government of the United States, as to the free use of public lands for grazing and pasturage purposes, defendant a citizen of the United States, owning the sheep in question, asserted its right under that privilege and policy, and grazed its sheep on said lands.

V.

Answering the allegations of paragraph six, defendant has no knowledge or information sufficient to form a belief.

VI.

Answering the allegations of paragraph seven, admits that it is grazing its sheep, and will con-

tinue so to do on said land, unless restrained from doing so.

Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands.

Denies that its grazing said sheep in the manner herein set forth is in violation of the law, and admits that it claims to have the right to graze said sheep upon the said lands.

Denies that its grazing its sheep on said lands is in violation of any right of ownership in the United States of America, and, in that connection, avers that its grazing its sheep on said lands is in accordance with the express wish and policy of the Government of the United States, as to the use of public lands, including the land in question.

VII.

Answering the allegations of paragraph eight, admits that it will continue to use said land for grazing purposes, unless restrained from doing so, and admits that its officers and agents, in the handling of said sheep will likewise do so, unless restrained.

Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant.

Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity.

Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity.

WHEREFORE, having answered complainant's bill of complaint, defendant prays that complainant's bill be dismissed, and that it be awarded its

costs in this behalf expended.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

EXHIBIT "C."

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

This is a suit to enjoin defendant from grazing sheep on lands now determined to be Indian lands held in trust by plaintiff. (221 Fed. 587), and for damages.

Plaintiff contends that it is entitled to recover one dollar per head of sheep grazed, by virtue of Sec. 2117 R. S., which provides that any one who drives any "stock of horses, mules or cattle, to range and feed on any land belonging to an Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." This is impossible for several reasons:

First, the statute contemplates lands so far in Indian occupancy and control that grazing will be an injury to the Indians and to which they may consent. The lands involved are otherwise.

Second, the penalty expressly attaches to "horses, mules or cattle" and sheep are not thereby included. It is apparent that Congress had in mind the particular and limited definition of the word "cattle"—animals of the bovine genus—and

not the general and extended meaning—all animals of domestic kind. Otherwise, horses and mules would not have been specially mentioned, or would have been so mentioned as to indicate but enumeration of particulars of a general class following.

To illustrate, “horses, mules or *any other* cattle.” For horses and mules are within the general meaning of “cattle,” even as sheep, swine, etc., are. Examination of the Acts of Congress, and especially Indian legislation, makes manifest that Congress practically invariably uses the word “cattle” in the limited sense of bovine animals, and for general inclusion makes use of the words “stock,” “useful domestic animals,” and “livestock.” In the earliest legislation to penalize grazing Indian lands, the prohibition was of “horses or cattle,” and the same act provided that the Indians would be supplied with “useful domestic animals.” 1. Stat. 747. Range animals were intended, and sheep were not then ranged. *U. S. vs. Mattock*, Fed. Case 15744 is to the contrary, but seems to lay too much stress upon the mischief intended to be remedied. A case is not within a penal statute though within the mischief of, unless also within the legislative intent as disclosed by the language used. It would seem Congress had in mind only the three classes of range animals, horses, mules and bovines, and fixed a proportionate penalty for punishment and not for confiscation as it often would be if applied to sheep or swine.

Third, if the complaint is sufficient for penalties, equity never aids the collection of statutory penalties. True, equity having jurisdiction retains it for full relief. But this for remedial and not punitive purposes. Here, for injunction and compensatory damages, and not for punishment of which are penalties.

Fourth, the appellate tribunal remanded the suit "with directions to enter judgment for the complaint for the injunction prayed for and for such damages as the court may find complainant entitled to."

That is the law of the case.

There is no evidence of substantial damages and for the technical trespass nominal damages are awarded.

Decree will be entered for an injunction, one dollar damages and costs.

BOURQUIN, J.

EXHIBIT "D."

*District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree.

This cause came on regularly to be heard on the 31st day of January, 1916, upon the motion of the complainant for judgment on the mandate of

the United States Circuit Court of Appeals for the Ninth Circuit, and upon the pleadings on file in said cause, and was by counsel for complainant and defendant submitted to the court and by the court taken under advisement;

And by it appearing to the court, and the court finds, as appears by its decision and memo filed herein and being hereof made a part, that the complainant is entitled to a perpetual injunction against the defendant, as prayed for in the bill of complaint, together with a judgment for the sum of one dollar nominal damages and costs of suit; and upon consideration thereof, and the court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, and its officers, agents, servants, attorneys and employes be, and they are hereby perpetually enjoined and restrained from grazing the sheep of said defendant upon the lands, or any thereof, particularly mentioned and described in the plaintiff's bill of complaint;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said complainant have and recover of and from the defendant the sum of one dollar damages and its costs and disbursements incurred in said action taxed in the sum ofDollars.

Done in Open Court this 10th day of February, 1916.

GEO. M. BOURQUIN, Judge.

*(Earlwood) D. M. of Court and Cause
Circuit Court, Filed June 15, 1916
Grove Spruce
Chas. K.*

And thereafter, on July 12th, 1916, plaintiff served and filed herein its demurrer to the answer of said defendant, which demurrer to said answer is in the words and figures following, to-wit:

*In the United States District Court, District of
Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Demurrer to Answer.

Now comes the plaintiff and demurs to the first defense set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

And the plaintiff demurs to the first further defense and answer set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

II.

That the same is insufficient in law upon the face thereof.

And the plaintiff demurs to the second further

defense set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

II.

That the same is insufficient in law upon the face thereof.

B. K. WHEELER,
United States Attorney.
HOMER G. MURPHY,
FRANK WOODY,
Asst. U. S. Attorneys.

Service of the within and foregoing demurrer accepted and receipt of copy thereof acknowledged this 12th day of July, 1916.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Demurrer to Answer. Filed July 12, 1916. Geo. W. Sproule, Clerk.

And, thereafter, on July 17, 1916, said demurrer coming on regularly to be heard by the court the same was by the court overruled and the court made and entered herein its order which is in the words and figures following, to-wit:

*In the District Court of the United States in and
for the District of Montana.*

NO. 506.

UNITED STATES

vs.

ASH SHEEP CO.

This cause came on regularly for hearing at this time upon demurrer to the answer, H. G. Murphy, Esq., Asst. U. S. Attorney, appearing on behalf of the United States, and C. B. Nolan, Esq., on behalf of the defendants; and thereupon demurrer submitted, and, after due consideration, it is ordered that the said demurrer be and the same hereby is overruled and plaintiff granted 5 days within which to file reply herein.

Entered in open court July 17, 1916.

GEO. W. SPROULE, Clerk.

And, thereafter, on July 20th, 1916, said plaintiff duly served and filed herein its reply to the said answer of said defendant, which reply is in words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Reply.

Now comes the plaintiff and for reply to the de-

defendant's answer filed herein;

1. Admits each and all of the allegations of paragraphs 1, 2 and 3 of the further answer set forth and contained in said answer.

2. As to the allegations and matters set forth and contained in paragraph 4 of the further answer set forth and contained in said answer, this plaintiff denies that it has any knowledge or information thereof, or of any thereof, sufficient to form a belief.

3. As to the allegations and matters set forth and contained in paragraph 5 of the further answer set forth and contained in said answer, this plaintiff denies that it has any knowledge or information thereof, or of any thereof, sufficient to form a belief.

And for a further reply to the further answer set forth and contained in the defendant's answer, plaintiff alleges:

1. That on the 11th day of August, 1913, the plaintiff herein filed its complaint in the above entitled court against the defendant herein, a copy of which complaint is attached to the defendant's answer herein marked Exhibit "A" and made a part thereof.

2. That on the 25th day of August, 1913, the defendant filed its answer to said complaint, a copy of which answer is attached to the defendant's answer herein, marked Exhibit "E" and made a part thereof.

3. That issue was joined in said action and that

conclusions of law were made by the court therein, a copy of which conclusions of law is attached to defendant's answer herein, marked Exhibit "C" and made a part of said answer.

4. That thereafter, to-wit, on the 10th day of February, 1916, a judgment and decree was duly made and entered in said action, a copy of which said judgment and decree is attached to defendant's answer herein, marked Exhibit "D" and made a part thereof.

5. That said judgment still remains in full force and effect and stands un-appealed from.

6. Plaintiff further alleges that said defendant having appeared in said action and having filed its answer therein, wherein the defendant admitted that it had been grazing its sheep to the number of seven thousand one hundred upon the lands described in the complaint in said action and described in the complaint herein, and that the said defendant would continue so to do until restrained by an order of this court, the said defendant is now estopped from maintaining or asserting the defense set forth and contained in the further answer herein.

And for reply to the further defense set forth and contained in defendant's answer, this plaintiff;

1. Admits each and all of the allegations set forth and contained in paragraphs 1 and 2 of said further defense.

2. Denies each and every allegation and all al-

legations set forth and contained in paragraph 3 of said further defense.

3. Admits that issue was joined in said action; and admits that in said cause conclusions of law were made by said court, a copy of which conclusions of law is attached to said answer, marked Exhibit "C" and made a part thereof; but save and except as herein specifically admitted, this plaintiff denies each and every other allegation, and all other allegations, set forth and contained in paragraph 4 of said further defense.

4. Admits each and all of the allegations set forth and contained in paragraphs 5 and 6 of said further defense.

5. Denies each and every allegation and all allegations set forth and contained in paragraph 7 of said further defense.

WHEREFORE the plaintiff having fully replied, prays for judgment as in its complaint.

B. K. WHEELER,

United States Attorney, District of Montana.

HOMER G. MURPHY,

Assistant U. S. Attorney, District of Montana.

FRANK WOODY,

Assistant U. S. Attorney, District of Montana.

United States of America,

District of Montana,—ss.

FRANK WOODY, being first duly sworn upon oath, deposes and says that he is a duly appointed, qualified and acting Assistant United States Attorney for the district of Montana; that he has read

the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FRANK WOODY.

Subscribed and sworn to before me this 20th day of July, A. D. 1916.

[Seal]

GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Reply.
Filed July 20, 1916. Geo. W. Sproule, Clerk.

And thereafter, on January 11th, 1917, the defendant filed in said court and cause its motion for judgment on the pleadings herein, which said motion is in words and figures following, to-wit:
In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Motion.

Now comes the defendant above named, and moves the court for judgment on the pleadings in its favor.

C. B. NOLAN,
WM. SCALLON,

Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Motion for Judgment on the Pleadings. Filed Jan. 11th,

1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And said motion was thereupon argued to the court and by the court taken under consideration and the court thereafter, to-wit, on the 11th day of January, 1917, duly filed herein its opinion in writing, which is in words and figures following, to-wit:

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

Defendant's motion for judgment on the pleadings, is granted.

The reasons therefor are set out in U. S. vs. Ash Sheep Co., 229 Fed. 480, Paragraph 2 at least.

In addition it may be observed that Congress first enacting the statute to include "horses or cattle" only, clearly understood those words were limited to equines in the limited sense, and bovines. For later, it amended or re-enacted the statute to embrace "mules," a variety of equines.

Here is proof of it. Not only did Congress not intend "cattle" to embrace more than bovines, but so literally did it intend "horses" or cattle," that although "horses" may import all equines and so, mules, it re-enacted the statute to include mules by express declaration.

Both horses and cattle, in their broad interpretation, include mules. Used in their narrower sense, neither included mules. Hence, the re-en-

actment to specify mules. Hence, also, is demonstrated that "horses, mules or cattle" in the reenactment import the same literal or narrow sense and does not include sheep.

Penal laws, and Mischief, see—

U. S. v. Sheldon, 2 Wheat 119.

[Indorsed]: Title of Court and Cause. Memo. Filed Jan. 11, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

And thereafter, on January 24th, 1917, judgment was duly rendered and entered herein in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Judgment.

In this action on the 11th day of January, 1917, the above cause came on to be heard on a motion for judgment on the pleadings filed by the defendant in said action, and upon due consideration of same by the court, the said motion was by the court sustained, and it was ordered and adjudged by the court that on the pleadings in said action the defendant was entitled to a judgment in its favor.

WHEREFORE by reason of the law and the premises aforesaid;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff in said action do recover nothing against the defendant by reason of said action.

DATED and entered this 24th day of January, 1917.

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy.

Attest a true copy.

GEO. W. SPROULE, Clerk.

By C. R. GARLOW, Deputy.

[SEAL]

And thereafter, on July 10, 1917, petition for a writ of error was duly filed herein, being in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable George M. Bourquin, Judge of the District Court aforesaid:

The United States of America, plaintiff above named, conceiving itself aggrieved by the judgment rendered and entered in the above entitled cause in the District Court of the United States for

the District of Montana, on the 24th day of January, A. D. 1917, the said judgment being the final and only judgment entered in said cause, and complaining that in the record and proceedings had in said cause, and also in the rendition and entry of said judgment, manifest error hath occurred to the great damage of the said plaintiff, as more fully appears from the assignment of errors which is filed with this petition, comes now and petitions the above entitled court for an order allowing said plaintiff to prosecute a writ of error out of the United States Circuit Court of Appeals in and for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and for such other and further order as to the court may seem just.

BURTON K. WHEELER,

United States Attorney, District of Montana.

The foregoing petition is granted and a writ of error is allowed to the United States of America.

Dated Helena, Montana, July 10th, 1917.

BOURQUIN, Judge.

[Indorsed]: Title of Court and Cause. Petition for Writ of Error. Filed July 10, 1917. Geo. W. Sproule, Clerk.

And thereafter, on July 10, 1917, plaintiff filed its assignments of error herein, which are in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Assignment of Errors.

And now, on this 10th day of July, 1917, come the plaintiff above named, by Burton K. Wheeler, United States Attorney for the District of Montana, its attorney, and says that the judgment made and entered in the above entitled cause on the 24th day of January, 1917, is erroneous and unjust to plaintiff:

First: Because the court erred in finding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States;

Second: Because the court erred in finding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States;

Third: Because the court erred in finding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belong-

ing to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock;

Fourth: Because the court erred in refusing to find that sheep are cattle within the meaning of the provisions 2117 of the Revised Statutes of the United States;

Fifth: Because the court erred in refusing to find that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

Sixth: Because the court erred in refusing to find that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such Tribe, is liable to a penalty of one dollar for each animal of such stock.

Seventh: Because the court erred in granting the motion for judgment on the pleadings made by the defendant above named;

Eighth: Because the court erred in holding that under the pleadings herein the defendant was entitled to judgment in favor of said defendant and against said plaintiff;

Ninth: Because the court erred in rendering judgment herein in favor of the defendant and against the said plaintiff;

Tenth: Because the court erred in entering

herein a judgment in favor of said defendant and against said plaintiff.

WHEREFORE plaintiff prays that said judgment be reversed and said district court be directed to enter a judgment herein in favor of said plaintiff and against said defendant as prayed for in the complaint of plaintiff, and such other and further relief as to the court may seem proper.

BURTON K. WHEELER,

United States Attorney, District of Montana.

[Indorsed]: Title of Court and Cause. Assignments of Error. Filed July 10, 1917. Geo. W. Sproule, Clerk.

And thereafter, on July 10, 1917, a Writ of Error was duly issued herein, which is in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the HONORABLE GEORGE M. BOURQUIN, Judge United States District Court for the District of Montana, and to the District Court of the United States for the District of Montana:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in said District Court, before you, between the United States of America plaintiff, and Ash Sheep Company, a corporation, defendant, manifest error hath occurred and happened to the said plaintiff, United States of America, as by its petition for a writ of error and assignment of errors appears, we, being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment be therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States Supreme Court this 10th day of July, A. D. 1917, and of the Inde-

pendence of the United States the one hundred and forty one.

[Court Seal] GEO. W. SPROULE,
Clerk District Court of the United States, District
of Montana.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy thereof acknowledged this 10th day of July, A. D. 1917.

C. B. NOLAN,
Attorney for Defendant, Ash Sheep Company.
[Indorsed]: Title of Court and Cause. Writ
of Error. Filed July 11, 1917. Geo. W. Sproule,
Clerk.

And thereafter, on July 10, 1917, a citation was duly issued herein, which is hereto attached and is in words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Citation.

United States of America,—ss.

United States of America to the above named defendant, Ash Sheep Company, and C. B. Nolan and William Scallon, its attorneys: GREETING:

You are hereby notified that in a certain cause

wherein the United States of America is plaintiff and the Ash Sheep Company is defendant pending in the District Court of the United States for the District of Montana a writ of error has been allowed and granted to said plaintiff to the Circuit Court of Appeals of the United States for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the city of San Francisco in the State of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, pursuant to said writ of error, why the judgment made and entered in said cause in said District Court should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable George M. Bourquin, Judge of the District Court of the United States for the District of Montana, this 10th day of July, 1917.

BOURQUIN,
Judge.

Service of a copy of the within citation and receipt of a copy thereof this 10th day of July, 1917, is hereby admitted and acknowledged.

C. B. NOLAN,
Attorney for Defendant.

[Indorsed]: Title of Court and Cause. Citation. Filed July 11, 1917. Geo. W. Sproule, Clerk.

And thereafter, on July 25th, 1917, plaintiff duly served and filed herein its praecipe for transcript

of record, which is in words and figures following:

UNITED STATES OF AMERICA,

Plaintiff and Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant and Defendant in Error.

NO. 506.

Praeceptum for Transcript of Record.

To Messrs. C. B. Nolan and William Scallon, attorneys for the above named defendant and defendant in error, and George W. Sproule, clerk of said court:

You, and each of you, will please take notice that the undersigned, the attorney for the plaintiff and plaintiff in error above named, hereby serves upon you and each of you this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above entitled cause which said plaintiff and plaintiff in error desires to and will incorporate in its transcript of record on writ of herein, to-wit, the writ of error issued herein on the 9th day of July, 1917, to have the judgment hereinbefore rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk of said District Court will incorporate and include in said transcript the following:

1. The judgment roll or final record in said cause consisting of the complaint, summons, demurrer to complaint, answer, demurrer to answer,

reply, motion for judgment on pleadings, decision of court and judgment;

2. Order granting leave to withdraw demurrer to complaint, and leave to file answer;

3. Order overruling demurrer to answer.

4. Petition for writ of error and order allowing same.

5. Assignment of errors filed with petition for writ of error.

6. Writ of error.

7. Citation on writ of error and acknowledgment of service by defendant.

8. Order extending time for completing and transmitting the record on writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit.

9. Copy of this praecipe.

BURTON K. WHEELER,

United States Attorney, District of Montana.

Service of the foregoing praecipe and receipt of a copy thereof this 25th day of July, 1917, is hereby admitted and acknowledged.

C. B. NOLAN,

WM. SCALLON,

Attorneys for Defendant Ash Sheep Company.

[Indorsed]: Title of Court and Cause. Praecipe for Record. Filed July 25, 1917. Geo. W. Sproule, Clerk.

And thereafter, on July 25, 1917, the said district court duly made and entered its order herein ex-

tending the time within which to prepare and have certified to said Circuit Court of Appeals of the United States for the Ninth Circuit the record on writ of error herein, which is in words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

**Order Extending Time to Prepare Record on
Writ of Error.**

Upon good cause shown, it is hereby ordered that the above named plaintiff who has heretofore sued out a writ of error from the Circuit Court of Appeals of the United States for the Ninth Circuit, may have thirty days in addition to the time allowed by the rules of court within which to have prepared and certified up to the said Circuit Court of Appeals the record on the writ of error herein.

Dated this 25th day of July, 1917.

BOURQUIN,

Judge.

And thereafter, on August 28, 1917, the said district court duly made and entered its order herein extending the time within which to prepare and have certified to said Circuit Court of Appeals of the United States for the Ninth Circuit the record

on writ of error herein, which is in words and figures to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Order Extending Time to Prepare Record on Writ of Error.

Upon good cause shown it is hereby ordered that the above-named plaintiff who has heretofore sued out a writ of error from the Circuit Court of Appeals of the United States for the Ninth Circuit, may have fifteen days in addition to the time allowed by the rules of the said Circuit Court of Appeals and the extension of time heretofore given by the order of this court made and entered on the 25th day of July, 1917, within which to have prepared and certified up to the said Circuit Court of Appeals the record on the writ of error herein.

Dated August 28, 1917.

BOURQUIN, Judge.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY,

Defendant.

Order Extending Time to Prepare Record on Appeal.

Upon good cause shown it is hereby ordered that the above named plaintiff who has heretofore sued out a writ of error from the Circuit Court of Appeals of the United States for the Ninth Circuit, may have twenty days in addition to the time allowed by the rules of said Circuit Court of Appeals and the extensions of time for such purpose heretofore given by orders of this court herein duly entered, within which to have prepared and certified up to said Circuit Court of Appeals the record on the writ of error herein.

Dated September 17th, 1917.

BOURQUIN,
Judge.

Clerk's Certificate to Transcript of Record,
United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 53 pages, numbered consecutively from 1 to 53, both inclusive, is a true and correct transcript of all pleadings, process, order, decree, decision, and all of proceedings in said cause required to be in-

corporated in the record on writ of error by the praecipe of plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, order allowing withdrawal of said demurrer and filing of answer, answer, demurrer to answer, order overruling demurrer to answer, reply, motion for judgment on pleadings, decision of court, judgment, petition for writ of error and order allowing same, assignment of errors, writ of error, citation, praecipe for record, orders extending time within which to file transcript of record in said Circuit Court of Appeals, and of the whole thereof as the same appear from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Twenty 45/100 Dollars and have been made a charge against plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 5th day of October, A. D. 1917.

[Seal]

Geo W Sproule
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

BURTON K. WHEELER,

United States Attorney,

HOMER G. MURPHY,

Assistant U. S. Attorney.

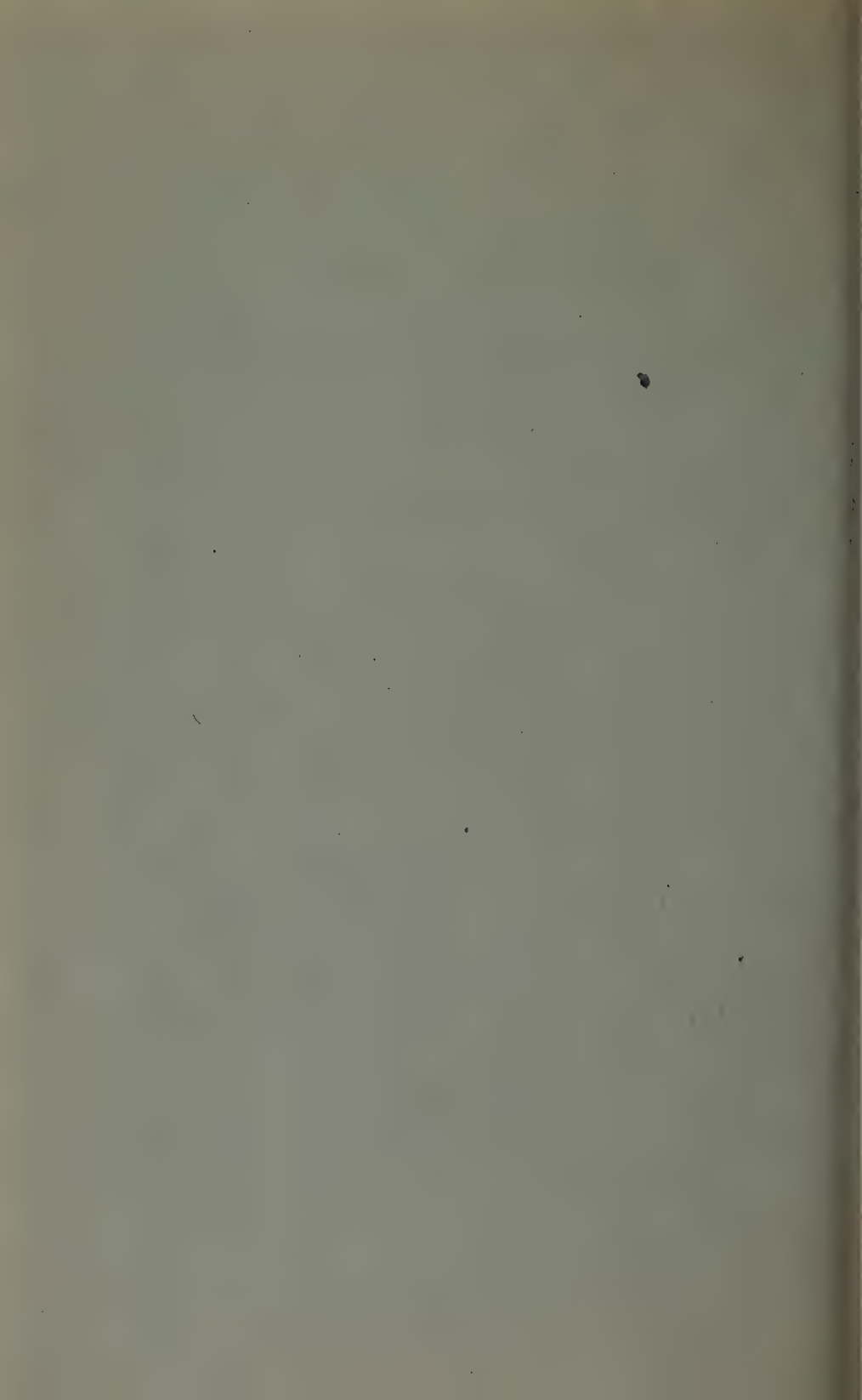
JAMES H. BALDWIN,

Assistant U. S. Attorney.

FILED

FEB 5 - 1918

MONKTON,
CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from a judgment entered in the District Court of the United States for the District of Montana, herein on the 24th day of January, 1917, against plaintiff in error and in favor of defendant in error, adjudging that plaintiff in error, who was also plaintiff in the lower court recover nothing against defendant by reason of said action (Tr. pp. 39-40).

The suit is one brought by plaintiff in error to recover from defendant a penalty in the sum of \$7100.00 under the provisions of section 2117 of the Revised Statutes of the United States.

The complaint alleges the corporate existence of defendant in error and that its business was that of stock raising and grazing — particularly sheep (Tr. p. 2); that certain lands, described in the complaint, and owned by the United States, and situate, lying and being within the original boundaries of the Crow Indian Reservation and forming a part thereof, in the state and district of Montana, and were opened to settlement under the terms of the Act of Congress approved April 27, 1904 (34 Stat. L. 352) upon which no settlement or allotment had been made and to which the Indian title had not been extinguished (Tr. pp. 2-3), Par. II, III and IV of complaint); that on or about July 13, 1913, the defendant in error in violation of Section 2117 Revised Statutes of the United States, without the consent or permission of the Crow tribe of Indians, drove, ranged, fed and grazed and caused to be driven, ranged, fed and grazed upon the lands described and other vacant lands of the same character about 7100 head of sheep, for which judgment for \$7100, the penalty of \$1.00 per head for each of said sheep is prayed (Tr. pp. 3-4).

Defendant in error was duly served with process (Tr. p. 7); filed a demurrer to the complaint which it withdrew (Tr. p. 8); and thereafter filed its answer. The answer is voluminous but briefly:

Admits the corporate existence of defendant in error, but denies it is now engaged in any business (Tr. p. 9).

Admits the allegations of paragraphs II, III and IV of the complaint, but denies any information and belief of any knowledge of the Indian title to the land (Tr. p. 9).

Denies the driving of the sheep upon the lands, except as qualified by the separate defenses and denies that plaintiff in error is entitled to the penalty (Tr. p. 9).

The answer sets up as a separate defense (Tr. pp. 10-12) that defendant in error had been extensively engaged in the sheep business and owned and leased divers tracts of lands upon that portion of the Crow Indian Reservation upon which the lands described in the complaint were situated and herded and grazed some of its sheep on such lands as were owned and leased by it (Tr. pp. 10-11); that in getting its sheep on to the lands owned and leased by it as aforesaid, defendant in error drove its sheep across the lands described in the complaint (Tr. pp. 11-12); and for a further defense to the complaint defendant in error pleaded as a further defense that the relief sought in the case at bar plaintiff in error is estopped from prosecuting this case for recovery of the penalty of \$7100 because plaintiff had elected to sue for damages in a certain action and had recovered \$1.00 damages (Tr. pp. 12-31).

Thereafter plaintiff in error served and filed its reply denying all new matters alleged in said answer as a defense to said complaint, and alleged affirmatively and by admissions the proceedings whereby an injunction was obtained against de-

fendant and damages for \$1.00 found in favor of plaintiff (Tr. pp. 33-37).

Thereafter defendant in error moved the court in writing for judgment on the pleadings herein (Tr. p. 37); which motion was by the court granted (Tr. p. 38) and judgment for defendant in error entered (Tr. p. 39) from which judgment this appeal is taken.

The District Court in granting defendant in error's motion for judgment on pleadings set forth its reasons for so doing (Tr. p. 38-39).

A writ of error to this court was asked for and granted (Tr. pp. 40-41) and assignment of errors filed contemporaneously therewith (Tr. pp. 42-44) and writ of error issued July 10, 1917 (Tr. pp. 46-47) citation was also duly issued, served and filed (Tr. pp. 46-47).

A reversal of the judgment appealed from is sought upon the following:

SPECIFICATIONS OF ERROR.

First: Because the court erred in finding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States;

Second: Because the court erred in finding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States;

Third: Because the court erred in finding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States

for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock;

Fourth: Because the court erred in refusing to find that sheep are cattle within the meaning of the provisions 2117 of the Revised Statutes of the United States;

Fifth: Because the court erred in refusing to find that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States;

Sixth: Because the court erred in refusing to find that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such Tribe, is liable to a penalty of one dollar for each animal of such stock.

Seventh: Because the court erred in granting the motion for judgment on the pleadings made by the defendant above named;

Eighth: Because the court erred in holding that under the pleadings herein the defendant was entitled to judgment in favor of said defendant and against said plaintiff;

Ninth: Because the court erred in rendering judgment herein in favor of the defendant and against said plaintiff;

Tenth: Because the court erred in entering

herein a judgment in favor of said defendant and against said plaintiff.

ARGUMENT.

Though there are ten assignments of error in this case, they may each and all be most properly considered together as the action of the lower court turned wholly upon the one proposition that “sheep” are not “cattle” within the purview of the Statute (Section 2117 Rev. Stat.)

In this connection we here beg to observe that the lower court seemed to be of the opinion that the meaning of the word “cattle” was the gist of the action. But in order that the trial judge’s decision herein (Tr. pp. 38-39) may not be considered to be good for the general reference he makes to his former decision (U. S. v. Ash Sheep Co., 229 Fed. 480) when he says in the case at bar (Tr. p. 38) “Defendants motion for judgment on pleadings is granted. The reasons therefore are set out in U. S. v. Ash Sheep Co., 229 Fed. 480, paragraph 2 at least,” we beg to leave to call this court’s attention that the decision found in 229 Fed. 480 was rendered in the case which was decided by this court in 221 Fed. 587, and the decision in 229 Fed. 480 insofar as it departs from this court’s decision in 221 Fed. 587 is bad law. It is most familiar law that the decision of an appellate court becomes the law of the case and is binding both on the lower court and the appellate court itself.

Standard Sewing M. Co. v. Leslie, 118 Fed. 557.

Oregon R. Co. v. Balfour, 90 Fed. 301.

So far as the decision herein is based on the decision in 229 Fed. 480, it should be confined solely to the trial judge's definition of the word cattle. The status of the lands involved is definitely settled so far as the United States District Court of Montana is concerned for it must accept the decision of this court and the decision in 221 Fed. 587 has never been reversed.

ARE SHEEP WITHIN THE STATUTE.

In considering this question we find a woeful lack of decisions that can be of much aid. The statute, Section 2117 United States Revised Statutes, never seems to have been a subject of judicial construction save in

U. S. v. Mattock, Fed. Case 15744,

where the United States District Court for Oregon held that sheep were within Section 2117, and in the decision above mentioned.

U. S. v. Ash Sheep Co., 229 Fed. 480.

In this case just cited, the lower court herein disregarded the decision in U. S. v. Mattock, *supra*, saying that it seemed to lay too much stress on the mischief intended to be prevented. We contend the Mattock case was the correct construction of section 2117. Judge Deady, in that decision, most fully treated every question that the lower court in the case at bar has decided against plaintiff in error, and the Mattock case, though of a district court decision is one that commands re-

spect, and should be followed herein. We refrain from quoting any part of the Mattock case as this court will undoubtedly prefer to read it in full.

In the case of U. S. v. Trice, 30 Fed. 495, it was said:

“* * * it would seem that the judicial definition always conforms to an enlarged or restricted interpretation, according to circumstances, the reasonable rule being to give that effect to the act which it shall appear from the words used, and the object to be accomplished, that the legislature wished to be done. Nor is the rule of strict construction for penal acts against this method of interpretation. U. S. v. Hartwell, 6 Wall. 385, 396; U. S. v. Mattock, 2 Sawy 148, 151, (Fed. Cases 15,744); The Bolina, 1 Gall 76, 83; U. S. v. Winn. 3 Simm. 309.”

The quotation is most appropriate for Congress could not have intended to penalize the grazing or driving of cattle, (bovine) mules and horses only upon Indian lands and intended that the grasses could be ruined or eaten off by sheep. It was clearly in the mind of Congress to protect the grass upon ranges owned by Indians and Indian tribes *for upon such grass* the Indian has depended for sustenance of his herds of ponies and cattle, which have always been reckoned by the Red Man as his wealth and means of livelihood. It has only been within the last few years that the Indian has turned to an actual tilling of the soil as a means to live.

While penal statutes are to be construed strict-

ly, they are not to be construed so strictly as to defeat the obvious intention of the law making body.

Wade v. U. S. 33 App. Cses (DC) 29; 17 Am. & Eng. Cases 707.

A statute may include by inference a case not originally contemplated when it deals with a genus within which another species is brought. Thus a statute making it unlawful wilfully to throw a stone at a railroad car, includes an inter-urban or traction railway car, although such cars were not known or in use at the time the statute was enacted.

State v. Cleveland, 83 Ohio State 61; 93 N. E. 467.

So in the case at bar, although it may be as the trial judge said "sheep were not then ranged" (Tr. p. 28, line 21), still there is nothing in the record to show they were not ranged, we submit the word "cattle" includes sheep. The lower court itself says the word "cattle" embraces sheep and swine (Tr. p....., lines 7-9).

The Supreme Court of Illinois in the case of Ohio & M. R. Co. vs. Brubaker, 47 Ill. 462, which was an action against a railway company for the killing of an ass, in passing upon a statute requiring railway companies to erect and maintain fences "sufficient to prevent cattle, horses, sheep and hogs from getting upon said railway" said:

"This statute is not, as assumed by counsel for appellants, a penal statute, and, therefore, to be strictly construed. It is, on the contrary, a remedial statute, imposing a reason-

able duty on railway companies, and furnishing a remedy to parties injured in case that duty is not performed. Its object was to protect domestic animals, and there can be no doubt the legislature intended to protect mules and asses as much as horned cattle, horses, sheep or hogs. Neither does the language of the statute create any difficulty in carrying out what we must presume to have been the legislative intent. The horse and the ass are both defined by lexicographers as “quadrupeds of the genus *equus*”, and the term “cattle” is defined by the same authorities as including horses and asses as well as domesticated horned animals. There are, then, two terms used in the statute, in either of which the ass might be included.”

In the case of *People v. Barnes, et al.* (Cal.) 2 Pac. Rep. 493, the definition of the word “cattle” as given by Worcester to be “a collective name for domestic quadrupeds, including the bovine tribe, also horses, mules, sheep,” etc., is approved, and it is held in this case that the use of the word cattle included at least all these. See also.

Henderson v. Ry. Co., 81 Mo., 605-607.

The Supreme Court of the United States in *Decatur Bank v. St. Louis Bank*, 88 U. S. (21 Wall.) 294-299, held that the mere word “cattle” in a letter of credit given to a man to enable him to purchase cattle included within its meaning “hogs”, so as to hold the giver of the letter of credit for moneys advanced on it that were used to purchase hogs. This case was cited and followed by the Supreme Court of North Carolina in *State v. Groves*, 119 N. C. 823; 25 S. E. 820, holding that

the term used in statute punishing abuse of cattle included goats.

In conclusion, we respectfully submit that the lower court erred in holding that no penalty was provided for by Section 2117 Revised Statutes upon one who drove and ranged or fed sheep upon Indian lands, and it was error to order and enter judgment for defendant in error. The judgment should be reversed with directions to the lower court to enter judgment in favor of plaintiff under the statute for the number of sheep plaintiff can prove were, on the land in violation of the statute. The admissions contained in defendants' answer herein (Tr. pp. 10-11) that it drove its sheep over this land entitle plaintiff to judgment as the reasons set forth in the answer for so driving the sheep do not relieve it of the penalty.

U. S. v. Lovering, 34 Fed. 715, 716.

Forsythe v. U. S., 63 S. W. 548.

Respectfully,

BURTON K. WHEELER,

United States Attorney.

HOMER G. MURPHY,

Assistant U. S. Attorney.

JAMES H. BALDWIN,

Assistant U. S. Attorney.



No. 2050

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA

Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant in Error.

Brief of Defendant in Error

C. B. NOLAN,

WM. SCALLON,

Solicitors for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA

Plaintiff in Error,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

A more extended statement of the proceedings which took place before the institution of the instant action may not be amiss. In 1913, the United States brought suit against the Ash Sheep Company to enjoin it from pasturing its sheep on this land, claiming that the Indian title to same had not been extinguished and claiming damages in the sum of \$7100.00. The trial court held that the lands were a portion of the public domain, and dismissed the proceedings. The case came to this court on appeal, and the judgment of the lower court was reversed, with directions to issue a permanent injunction and with directions to ascertain the damages done on account of the trespasses

committed. A decree in that action was rendered and entered, permanently enjoining the company from grazing its sheep on this land and awarding it one dollar damages. (Answer, Tr. pp. 9-31.) No appeal was taken by the United States from this decree. An appeal, however, was taken from the decree by the Ash Sheep Company. The present action was instituted by the United States to recover the penalty provided for by Section 2117 of the Revised Statutes of the United States, which reads as follows:

“Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.”

It is alleged in the complaint that the lands in question were within the original boundaries of the Crow Reservation; that they were vacant lands on which no settlements had been made, and that the Indian title to them had not been extinguished; that 7,100 head of sheep were ranged over and grazed on the lands, and that under the provisions of the law above referred to, the United States was entitled to recover the sum of \$7,100.00 for the use and benefit of the Indians. (Complaint, Tr. p. 2.)

The answer denied that the Indian title had not been extinguished; denied the item of damages, and denied the grazing of the sheep, except to the extent set forth. The answer then alleged that the

Ash Sheep Company owned several tracts of this ceded land; that it leased several tracts from the owners amounting, in the aggregate, to several thousand acres, as to which the title had passed from the Government, and that this land was in separate tracts or bodies, and that in getting three or four thousand head of its sheep to these lands, they were necessarily driven across the land involved, and thus being driven they grazed on the land, and it was likewise alleged that the lands owned and leased by the company were so situate that they could not be used by it for pasturage purposes without the sheep being driven across the land involved.

The answer likewise set up the former litigation, as above set forth, and urged that by reason of such litigation, the United States was estopped from maintaining the present action, and that its right to recover the penalty was determined adversely to it in the former litigation. (Answer, Tr. pp. 9-14.)

A motion for judgment on the pleadings was presented by the defendant company and sustained. (Tr. p. 37.) And a judgment in its favor was rendered and entered. (Tr. p. 40.)

ARGUMENT.

The trial court in sustaining the motion held that the law referred to did not apply to sheep. (Tr. p. 38.)

United States v. Ash Sheep Co., 229 Fed.
479.

The character of the land, so far as this court is concerned except as the matter may be again taken up, is disposed of by *United States v. Ash Sheep Co.*, 221 Fed. 582. As already stated, when the final judgment was entered in that case, the Ash Sheep Company appealed from the decree in that case. The United States did not appeal. The question of the character of the land is again presented for review in the appeal of the Ash Sheep Company, and that is the only question that is presented and the brief in that case, reviewing the question at length, renders it unnecessary in this brief to discuss that particular subject, except to refer to and rely on the brief in that appeal.

We will take up in this brief, then, the other questions, which, from our standpoint, are involved, not intending, however, to waive in this case the consideration of the question that the said lands were public lands to which the Indian title was extinguished.

(See Appellant's brief Case No. 2885, now pending in this court.)

Ash Sheep Co. v. United States of America,
221 Fed. 583.

Taking up the law under which this penalty is sought, it will be conceded that the statute in question is a penal one, and in construing such a statute, the rule of strict construction applies. Under such rule, nothing should be included that fairly does not come within the express provisions of the law. The Supreme Court of the

United States has declared in various cases the rule of construction that should apply in the case of penal statutes. We instance the following:

“No one can be punished for the violation of a statute unless his case is plainly and unmistakably within its terms.”

United States v. Lacher, 134 U. S. 624, 33 L. Ed. 1080.

The object of a penal statute is to modify the purpose of the legislative intent, not to furnish scientific definitions, and that intent is usually to be found in giving to the words the meaning used in ordinary speech.

Sarlls v. U. S., 152 U. S. 570, 38 L. Ed. 556.

Penal laws are to be construed strictly. The intention of a penal statute must be found in the language actually used interpreted according to its fair and obvious meaning.

U. S. v. Harris, 177 U. S. 305, 44 L. Ed. 780.

To the same effect is the doctrine declared in the following cases:

U. S. v. Gooding, 12 Wheat. 460, 6 L. Ed. 693;

Greeley v. Thompson, 10 How. 225, 13 L. Ed. 397;

Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766;

Tiffany v. Nat'l. Bank of Mo., 18 Wall. 409, 21 L. Ed. 862.

We quote the following from the case of United States v. Harris, 177 U. S. 305, 44 L. Ed. 780:

“It must be admitted that, in order to hold the receivers, they must be regarded as included in the word ‘company.’ Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.”

This court having in mind this rule, used the following language in the case of

Bircher v. U. S., 169 Fed. 591;

“We do not overlook the general rule that the intention of the legislature is to be gathered from the words which they employ, and that while a case may fall within the mischief to be remedied, and in the same class therewith, still, if it be not within the words of the statute, construction will not be permitted to bring it therein.”

Surely, no one would contend for a moment, speaking of cattle in ordinary conversation, by

any stretch of the imagination it could be said he had in mind sheep. If the enlarged meaning is given to the term, then it might be pertinently asked, why mention horses and mules? The mentioning of these animals specifically, clearly indicates a purpose that the enlarged meaning should not be given to the term "cattle," as contended for by the government. The term "cattle" as generally understood is used in reference to animals of the bovine species. This is true where, in excise laws, custom duties are imposed on hides.

Rossbach v. U. S., 116 Fed. 781;
U. S. v. Schmoll, 154 Fed. 734.

(See also decision of trial court in case U. S. v. Ash Sheep Co., 229 Fed. 479.)

Keys v. U. S., 103 Pac. 874.

As a further aid to construing this law, reference may be made to its genesis and history.

The Supreme Court of the United States in the case of

U. S. v. Hirsch, 100 U. S. 33, 25 L. Ed. 539, said that in construing any part of the United States Revised Statutes, it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

See likewise:

U. S. v. Bowen, 100 U. S. 508, 25 L. Ed. 631,
The Conqueror, 166 U. S. 110, 41 L. Ed. 937;
U. S. v. Lacher, *supra*.

Tracing the history of this law, we find it first

in the statutes of 1799. Then in force, it read as follows:

*“And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, * * shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.”*

(Sec. 2 of Act of 1799, First Stat. at Large, page 744.)

The subject was next considered by Congress in the year 1834 when the law as it now stands was enacted. (4 Stat. at Large, page 730.) In the first act, it will be noticed that horses and cattle were mentioned, in the later act mules were added. If, in this legislation, Congress intended to give to the term “cattle” the extended meaning which the Government insists should be given to it, there was no need for expressly mentioning mules. Indeed, so far as that is concerned, if the contention of the government is upheld, the mentioning of horses and mules was unnecessary. We insist that there is in the history of this legislation the purpose of the law-making body to give to the terms used a generic limitation.

Former Adjudication and Estoppel.

In the equitable action that was instituted, the government sought to recover this penalty. It is

true that no express mention is made of the fact that the damage demanded was by virtue of the law in question. It is true, nevertheless, that the right to recover the damage under this law was asserted. In the equitable action the Government insisted that, regardless of the damage that was done, the statute fixed the amount of it, and it was entitled to recover one dollar per head. The trial court decided against it, and that decision stands unappealed from and has in it the element of finality. We submit that the decision in that case, adverse to the United States, as to its right to recover this money, is determinative of its right to do so in the present action.

In the case of

Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095,

the Supreme Court of the United States declared that a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions, though the form and causes of action be different.

In the case of

Southern P. R. Co. v. U. S., 168 U. S. 1, 42 L. Ed. 355,

it was declared that a right to question a fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties and their privies, even

if that suit is for a different cause of action. And in the case of

Wabash Gas Light Co. v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712,

it was said that for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined.

In the equitable action, the United States insisted on its right to recover this penalty, as we have already stated. The trial court held against its claim as will be noticed by the decision.

U. S. v. Ash Sheep Co., 229 Fed. 479.

The judgment in that case stands unreversed and is unappealed from and we insist that it stands as a bar against the maintenance and prosecution of the present action.

We submit, likewise, that the United States in demanding damages, as it did in the equitable action, should now be estopped (having recovered damages in that action for the injury done) from maintaining the present action to recover additional damages. This principle we are now contending for finds expression in the case of

Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506,

where it is said that where a party having a choice of remedies for a wrong done, selects one, proceeds to judgment and reaps the fruit of his judg-

ment, he cannot afterwards proceed in another suit for the same cause of action.

And Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit in the case of

Union Central Life Ins. Co. v. Drake, 214
Fed. 536,

said:

“When the second suit is upon a different cause of action but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action.”

In this case, in the equitable action, under the proof adduced for the purpose of showing damages, the government was unable to show that any damage was done; but the trespass being admitted, nominal damages were awarded. In that action, the government insisted, regardless of the actual damage, that it was entitled to recover one dollar per head by virtue of the provisions of the statute under consideration. The trial court, rightfully or wrongfully, decided against this contention. Surely, the government is not at liberty, having permitted the judgment in that case to become final, to relitigate this question. If it felt dissatisfied with the incorrectness of that judgment, it should be appealed from. Not having done so, that judgment is final, and the determination of the right to recover this penalty having been passed upon in that action, it cannot now in the

present action again assert that right. The judgment under review should be affirmed.

Respectfully submitted,

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District, Appellants,

VS.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated. Appellees.

Transcript of the Record

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

No.-----

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Transcript of the Record

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

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Names and Addresses of Counsel

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*In the District Court of the United States for the
District of Idaho, Southern Division.*

In Equity No. 479.

J. PAUL THOMPSON, Plaintiff,

vs.

EMMETT IRRIGATION DISTRICT, a municipal
corporation, W. H. SHANE, N. B. BARNES, and
E. J. REYNOLDS, as Directors, and R. B. SHAW
as Treasurer of said Emmett Irrigation District,
Defendants.

BILL OF COMPLAINT.

*To the Honorable, the Judge of the District Court of
the United States for the District of Idaho, South-
ern Division:*

J. PAUL THOMPSON, a citizen of the State of
Ohio, residing in the City of Cleveland, said State,
brings this his Bill of Complaint against the Emmett
Irrigation District, a municipal corporation organ-
ized under the irrigation district laws of the State
of Idaho and situated in Canyon County, said State,
and W. H. Shane, N. B. Barnes, and E. J. Reynolds,
as Directors of said Emmett Irrigation District, and
R. B. Shaw as Treasurer of said District, all resi-
dents and citizens of the State of Idaho residing in
Canyon County, State of Idaho; and thereupon your
orator complains and says:

I.

That your orator is a citizen and resident of the
State of Ohio residing in the City of Cleveland, said
State of Ohio.

II.

That the defendant Emmett Irrigation District is a municipal corporation organized and existing under the laws of the State of Idaho providing for the organization of irrigation districts.

III.

That the defendants W. H. Shane, N. B. Barnes and E. J. Reynolds, are the duly elected, qualified and acting Directors of the said Emmett Irrigation District and constitute the Board of Directors of said District, and they are citizens and residents, and each of them is a citizen and resident of the State of Idaho, residing in Canyon County, said State.

IV.

That the defendant R. B. Shaw is the duly appointed, qualified and acting Treasurer of said Emmett Irrigation District and is a citizen of the State of Idaho residing in Canyon County, said State.

V.

That the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of \$3,000.00 and is wholly between citizens of different states.

VI.

Your orator further shows that the said Emmett Irrigation District was organized on or about the 13th day of September, 1910, under and pursuant to an Act of the Legislature of the State of Idaho, entitled, "An act relating to irrigation districts and to provide for the organization thereof, and to pro-

vide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9th, 1903, and the acts amendatory thereof and supplemental thereto, the same being known as Title 14 of the Political Code of the State of Idaho; and that thereafter and on or about the 2nd day of November, 1910, the Board of Directors of said District at a meeting thereof duly and legally held for such purpose, proceeded to determine the amount of money necessary to be raised for acquiring the works, water rights and property and carrying out the plans theretofore formulated in the manner provided by law for furnishing and supplying water for the irrigation of the lands within said Emmett Irrigation District; that said Board at said meeting determined that the sum of One Million One Hundred Thousand Dollars (\$1,100,000.00) was the amount of money necessary to be raised for acquiring the works and water rights and carrying out the plans so formulated and deemed necessary for irrigating the lands within said District; and thereupon and on said 2nd day of November, 1910, the said Board called a special election to be held in said District on December 3rd, 1910, at which election there should be submitted to the electors of said District, possessing the qualifications prescribed by law, the question whether or not the bonds of said District in the amount of One Million One Hundred Thousand Dollars (\$1,100,000.00) should be authorized; that notice of such election was given by posting and pub-

lication for the time and in the manner required by the statutes of Idaho relating to such matters, and at such election one hundred and eight (108) votes were cast, all of which were "Bonds—Yes", and no votes were cast "Bonds—No," and on the 6th day of December, 1910, the said Board of Directors canvassed the returns of said election as aforesaid and declared the bonds of said District authorized for the sum and in the amount of One Million One Hundred Thousand Dollars (\$1,100,000.00).

VII.

And your orator further shows that on or about the 19th day of December, 1910, the Board of Directors of said District filed in the District Court of said Canyon County a petition praying in effect that all proceedings of said Board from the organization of said District to and including the authorization and issuance of said bonds may be examined, approved and confirmed by the Court, and also that the proceedings of the Board of County Commissioners of Canyon County relating to the organization of said District may also be approved, examined and confirmed by the Court, and praying that said District may be held and decreed legally organized and that the bonds authorized to be issued as aforesaid may be held and decreed to be the legal, valid and binding obligations of said District; that such proceedings were had on said petition and in the matter of the confirmation of the organization of said District and the authorization of said bonds, that thereafter and in the month of January, 1911, the said

District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County made its findings of fact and conclusions of law and entered its judgment and decree approving and confirming each and all of the proceedings had and taken for the organization of said District, and adjudging the same to be duly organized, and that said bonds had been legally and properly authorized by the votes of the electors of said District at the election held as aforesaid on the 3rd day of December, 1910, and thereafter an appeal was taken from said judgment and decree to the Supreme Court of the State of Idaho, which Court on the 14th day of February, 1911, in a cause entitled "Emmett Irrigation District, a corporation, Respondent, vs. W. H. Shane, Appellant," affirmed the judgment entered by the said District Court and by its said decision (19 Idaho Reports, page 332, et seq.) approved and confirmed all the proceedings had and taken for the organization of said District and the authorization of said bonds.

VIII.

Your orator further shows that thereafter the said Emmett Irrigation District, acting by and through its Board of Directors, caused the bonds of said District, authorized as aforesaid, to be issued, sold and delivered to the amount of Nine Hundred Thousand Dollars (\$900,000.00) or upwards, as your orator is informed and believes and so alleges the fact to be.

IX.

Your orator further shows that the said bonds were coupon bonds negotiable in form and payable to bearer and were issued as provided in Section 2397 of the Revised Codes of Idaho, and were of the denominations of One Hundred Dollars (\$100.00), Five Hundred Dollars (\$500.00), and One Thousand Dollars (\$1,000.00), respectively, and, except as to number, amount and date of maturity, were identical in form and of like tenor and effect, and were in words and figures substantially as follows, to-wit:

“UNITED STATES OF AMERICA.

STATE OF IDAHO.

COUNTY OF CANYON.

\$.....

EMMETT IRRIGATION DISTRICT.

Number.....

First Issue.

Six Per Cent. Municipal Irrigation District Bond.

Series No. 1Year Bond.

KNOW ALL MEN BY THESE PRESENTS:

That the Emmett Irrigation District, a municipal corporation located in the County of Canyon, State of Idaho, for value received, acknowledges itself to owe and hereby promises to pay to the bearer hereof the sum of.....DOLLARS (\$.....) on the First day of January, A. D. 19...., together with interest thereon from the date hereof until paid at the rate of six per cent. (6%) per annum, interest payable semi-annually on the first days of January and July in each year upon presentation of the annexed interest coupons as they severally become due.

Both principal and interest are payable in lawful money of the United States of America at the office of the Treasurer of Emmett Irrigation District in the County of Canyon in the State of Idaho, or, at the option of the holder hereof. at the Fort Dearborn Trust and Savings Bank in the City of Chicago, Illinois. This bond is one of a series of bonds aggregating One Million One Hundred Thousand Dollars (\$1,100,000.00) in amount and issued by the undersigned by authority of an act of the Legislature of the State of Idaho entitled "An Act relating to irrigation districts and to provide for the organization thereof and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9th, 1903, together with acts amendatory thereto and supplemental thereto, the same being known as "Title 14 of the Political Code of the State of Idaho," entitled "Irrigation Districts." Said Series consisting of two hundred and sixty-two (262) bonds of the par value of One Thousand Dollars (\$1,000.00) each, numbered consecutively from M-1 to M-262, inclusive; sixteen hundred and forty-six (1646) bonds of the par value of Five Hundred Dollars (\$500.00) each, numbered consecutively from D-1 to D-1646 inclusive, and one hundred and fifty (150) bonds of the par value of One Hundred Dollars (\$100.00) each, numbered consecutively from C-1 to C-150, inclusive, which are due and payable as follows: Fifty-five Thousand Dollars (\$55,000) in amount, being bonds

numbered from D-1 to D-110, inclusive, on January 1st, 1922; Sixty-six Thousand Dollars (\$66,000) in amount, being bonds numbered from M-1 to M-7, inclusive, and from D-111 to D-228, inclusive, on January 1st, 1923; Seventy-seven Thousand Dollars (\$77,000) in amount, being bonds numbered from M-8 to M-17, inclusive, and from D-229 to D-362, inclusive, on January 1st, 1924; Eighty-eight Thousand Dollars (\$88,000) in amount, being bonds numbered from M-18 to M-32, inclusive, and from D-363 to D-508, inclusive, on January 1st, 1925; Ninety-nine Thousand Dollars (\$99,000) in amount, being bonds numbered from M-33 to M-42, inclusive, and from D-509 to D-656, inclusive, and from C-1 to C-150, inclusive, on January 1st, 1926; One Hundred and Ten Thousand Dollars (\$110,000) in amount, being bonds numbered from M-43 to M-57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927; One Hundred and Twenty-One Thousand Dollars (\$121,000) in amount, being bonds numbered from M-58 to M-92, inclusive, and from D-827 to D-998, inclusive, on January 1st, 1928; One Hundred Forty-Three Thousand Dollars (\$143,000) in amount, being bonds numbered from M-93 to M-137, inclusive, and from D-999 to D-1194, inclusive, on January 1st, 1929; One Hundred Sixty-Five Thousand Dollars (\$165,000) in amount, being bonds numbered from M-138 to M-192, inclusive, and from D-1195 to D-1414, inclusive, on January 1st, 1930, and One Hundred Seventy-Six Thousand Dollars (\$176,000) in amount, being bonds numbered from M-193

to M-262, inclusive, and from D-1415 to D-1646, inclusive, on January 1st, 1931. And it is hereby certified that all things required by law to be done in and about the organization of said District and the issuance of the said bonds have been done, have happened and have been performed, and that the issuance of this bond has been duly and legally authorized by vote of the electors of said District at a special election duly called and held in accordance with the provisions of the said Act and by resolution of its Board of Directors, and that all other acts, conditions and things required by the laws and constitution of the State of Idaho precedent to and in the issue and delivery of this bond have been done, have happened and have been performed, and that said bonds are the valid, binding and legal obligation of the said District; that all the real property included within said District is subject to the levy of an annual tax for the payment thereof.

IN WITNESS WHEREOF, the said Emmett Irrigation District has by virtue of the authority aforesaid caused this bond to be executed in its name by its President and Secretary and the seal of its Board of Directors to be affixed hereto this First day of January, A. D. 1911.

(Seal) EMMETT IRRIGATION DISTRICT.

(Signed) By W. E. BELL,

Attest:

President.

HARRY S. WORTHMAN,

Secretary."

That to each of said bonds semi-annual interest coupons were attached, all of which were of like tenor and effect and identical in form, except as to date of maturity, amount, and the number of the bond to which they were attached; said coupons, with the exceptions stated, being substantially in words and figures following, to-wit:

“On the first day of.....A. D. 19....,
EMMETT IRRIGATION DISTRICT will pay to
bearer at the office of the County Treasurer of Can-
yon County, Idaho, or at the option of the holder
hereof at Fort Dearborn Trust and Savings Bank in
the City of Chicago, Illinois, the sum of.....
Dollars in lawful money of the United States, being
six months' interest due that day on its Municipal
Irrigation District Bond of January 1st, A. D. 1911.
Series No. 1, Issue No. 1.
No.....\$.....

HARRY S. WORTHMAN,

Secretary.”

X.

Your orator further shows that all of said bonds were signed by the President and Secretary of said Emmett Irrigation District, and the seal of the Board of Directors of said District affixed thereto, and that the interest coupons attached to said bonds were each and all signed by the Secretary of said District. And said bonds were thereupon issued and sold by said District in the manner in such cases made and provided by the laws of the State of Idaho, as your orator is informed and believes and so alleges the fact to

be, and the proceeds thereof received and used by said District in the purchase of irrigation works, water rights and property required or deemed necessary by the Board of Directors of said District for carrying out the plans formulated by said Board, as hereinbefore stated, for the purpose of furnishing water for irrigating the lands situated within the boundaries of said District.

XI.

Your orator further alleges and shows that relying upon the decision of the Supreme Court of the State of Idaho in the cause heretofore referred to wherein the said Emmett Irrigation District was respondent and the said W. H. Shane, appellant, reported in Volume 19, Idaho Reports, page 332, and the decision of the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County in said cause holding, adjudging and decreeing said District legally organized and existing, and that said bonds had been legally authorized and were the valid and binding obligations of said District, and relying also upon the recitals contained in said bonds that the same had been issued in compliance with the laws of the State of Idaho and that all things required to make the same the legal, valid and binding obligations of said District had been done and had happened and been performed, and that all real property included within said District was subject to levy of an annual tax for the payment thereof, and without notice or knowledge of any fact whatsoever impairing the validity of said bonds or any of them, your orator pur-

chased prior to January 1st, 1914, for a valuable consideration the bonds of said District issued as aforesaid, to the amount of One Hundred and One Thousand Dollars (\$101,000.00) and now is and ever since has been the owner and holder of said bonds, which said bonds are of the number and denomination following, to-wit:

M-14, M-15, M-16, M-18, M-19, M-132, M-133, M-134, M-135, M-136, M-143, M-144, M-145, M-203, and M-232, total fifteen (15) bonds, each of the denomination of One Thousand Dollars (\$1,000.00), and D-63, D-64, D-65, D-66, D-111, D-112, D-120, D-121, D-139, D-140, D-141, D-142, D-150, D-151, D-152, D-153, D-154, D-174, D-175, D-176, D-177, D-178, D-179, D-180, D-246, D-261, D-268, D-279, D-280, D-283, D-284, D-285, D-286, D-287, D-288, D-307, D-310, D-311, D-312, D-318, D-319, D-361, D-408, D-409, D-410, D-411, D-412, D-416, D-417, D-418, D-481, D-482, D-483, D-484, D-485, D-486, D-487, D-488, D-489, D-490, D-500, D-501, D-502, D-503, D-504, D-519, to D-538, inclusive, D-569 to D-578, inclusive, D-594, D-599, D-644, D-645, D-651, D-652, D-653, D-654, D-655, D-656, D-673, D-674, D-675, D-676, D-717 to D-726, inclusive, D-742, D-743, D-780, D-783, D-784, D-785, D-786, D-787, D-788, D-801 to D-814, inclusive, D-833, D-1065, D-1066, D-1070, D-1071, D-1072, D-1278, D-1279, D-1280, D-1281, D-1305, D-1306, D-1307, D-1308, D-1309, D-1321, D-1332, D-1432, D-1598, D-1599, and D-1600 to D-1609, inclusive, total one hundred seventy-two (172) bonds, each of the denomination of Five Hundred Dollars (\$500.00).

XII.

Your orator further alleges and shows that after the said District had sold, issued and delivered its said bonds, it determined the benefits which would accrue to each of the tracts or subdivisions of land from the purchase and construction of the irrigation works and paid for by the proceeds from the sale of said bonds, and said Board caused the cost of such works to be apportioned over each tract and subdivision of land in said District in proportion to the benefits received, all as provided in Section 2399 of the Revised Codes of Idaho as amended by Chapter 154 of the Session Laws of 1911 of the Legislature of the State of Idaho, and said Board caused to be prepared a list of such apportionment or distribution containing a complete description of each subdivision or tract within said District, with the amount and rate per acre of the apportionment of such costs and the name of the owner thereof, together with all necessary maps, and the action of such Board in apportioning such benefits and the cost of such works to the several tracts of land in said District was thereafter and upon the petition of such Board, filed as required by law, duly approved and confirmed by the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County and the decree and judgment of said Court in said matter was entered on or about theday of June, 1913, and no appeal was taken therefrom, and such decree has become final.

XIII.

Your orator further alleges and shows that all interest accruing on said bonds and evidenced by interest coupons thereto attached, as aforesaid, maturing January 1st and July 1st of each year, has been paid, except the interest coupons maturing January 1st, 1914, none of which have been paid, and the amount of such interest coupons attached to the bonds held by your orator and representing the interest due thereon on the 1st day of January, 1914, and remaining unpaid as aforesaid, aggregates the sum of Three Thousand Thirty Dollars (\$3,030.00).

XIV.

Your orator further shows that on or about the 22nd day of October, 1913, at a regular adjourned meeting of the regular session of the Board of Directors of said District for the said month of October, the said Board of Directors levied an assessment against all the lands in said District, aggregating Fifty-Five Thousand Dollars (\$55,000.00) for the payment of the interest maturing January 1st, 1914, and July 1st, 1914, upon the outstanding bonds of said District, including the bonds owned and held by your orator as aforesaid, which said levy and assessment was based upon the assessment of benefits as fixed by the said Board and confirmed by the said District Court in and for Canyon County, as aforesaid, and the Secretary of said District thereupon prepared the assessment book and on or before November 1st, 1913, delivered the same to the Treasurer of the District. That the

Treasurer of said District after receiving such assessment book from the Secretary, and within ten days thereafter, published notice for the time and in the manner required by Chapter 139 of the Session Laws of 1911 of the State of Idaho, amending Section 2412 of the Idaho Revised Codes, that said assessments were due and payable and would become delinquent at six o'clock P. M. on the third Monday of December next thereafter, and stated also therein the times and places at which payments of the assessments might be made, which notice was published for at least three times in a weekly paper published in the County in which said District is situated.

XV.

Your orator further shows that a large number of land owners and taxpayers in said Emmett Irrigation District have paid the taxes so levied and assessed against their said lands for the payment of interest on the bonds held by your orator and on other outstanding bonds of said Emmett Irrigation District, but the said District and the Treasurer and Board of Directors thereof have failed and neglected to use any of said money so collected to pay the interest on said bonds maturing January 1st, 1914, but have allowed default to be made in the payment of such interest and have failed and neglected to deposit with the said Fort Dearborn Trust and Savings Bank of Chicago, Illinois, any money to meet the interest maturing January 1st, 1914, on the bonds of said District, and on or about the 9th day of January, 1914, your orator caused to be presented to the Treasurer

of said District for payment the interest coupons maturing January 1st, 1914, on his said bonds which said interest coupons aggregate, as heretofore stated, Three Thousand and Thirty Dollars (\$3,030.00), and demanded payment thereof, but the said Treasurer, notwithstanding he had in his possession and in his custody and control the interest fund belonging to said District and collected as aforesaid from the taxpayers in said District for the purpose of paying such interest, and which interest fund exceeded the amount of the coupons so presented for payment, declined to pay said coupons or any of them, and declined to use the money in such interest fund for the payment of said coupons, and the said District is now in default in the payment of said coupons, notwithstanding there is, as heretofore stated, in the possession of the Treasurer of said District and under his control sufficient money in the interest fund created for such purpose, with which to pay such coupons.

XVI.

Your orator further shows that for some reason unknown to your orator the said defendants declined to apply the moneys collected from the taxpayers of said District with which to pay said interest, to the payment of the interest due on said bonds or the coupons held by your orator, and unless enjoined and restrained by this Honorable Court the said defendants will either return such money to the persons from whom the same was collected or who paid the same to said Treasurer for the use of said interest fund, or will divert such money from the

interest fund and use it for other purposes and will not apply it to the payment of interest or to any purpose for the benefit of the holders of said bonds.

XVII.

Your orator further alleges and shows upon his information and belief that default in payment will be made by the said defendants from time to time as each installment of interest on said bonds becomes due and payable. And your orator further shows that the principal of none of said bonds will become due or payable for many years to come; that said bonds mature serially, commencing the first day of January, 1922, and extending over a period of ten years, as provided in Section 2397 of the Revised Codes of Idaho; that should your orator and other holders of said bonds be required to bring suits against said District as each installment of interest on said bonds becomes due, or as the principal of said bonds mature, numerous suits would be required; and if suit or action against the District be delayed until all of said bonds have become due and payable great and irreparable injury will be sustained by your orator and all holders of said bonds because of loss of interest and the uncertainties and unsettled conditions for many years and which will wholly destroy the market value of said bonds in the meantime; that it would be impossible for said District and the taxpayers therein to pay the whole of said bond issue and the accumulated interest thereon by one levy or assessment; that the same can only be paid in installments extending over a long period

as provided in said bonds and as contemplated by the laws of the State of Idaho relating to such matters.

Your orator further shows that in order to avoid great loss and injury to your orator and other holders of said bonds, it is necessary to have said bonds decreed without delay, to be the legal and valid obligations of said District, and to have appropriate process for enforcing the payment of the interest and principal thereof, as the same becomes due from time to time. And your orator brings this suit for himself and all other holders of bonds of said District, who may desire to join in this proceeding and pay their proper proportion of the costs herein.

XVIII.

Your orator further alleges and shows upon his information and belief, that the said defendants, officials of said District, are counselling and advising taxpayers in said District not to pay their taxes levied for the purpose of paying the interest on said bonds, and are making no effort to collect the payment of such taxes, but by their actions, conduct, and statements, are encouraging default in the payment of such taxes and are encouraging agitation and litigation against the bondholders, and fomenting a spirit of repudiation among the taxpayers, with a view of ultimately repudiating the payment of the bonds issued as aforesaid, and the interest thereon, including the coupons held by your orator, as aforesaid; and inviting suits by taxpayers of said District, attacking the validity of such bonds and the right of the Dis-

trict to pay such bonds or the interest thereon; that said defendants by their conduct and actions are greatly depreciating the market value of said bonds, and causing irreparable injury to your orator in the premises, and to other holders of the bonds of said District; that said defendants should in justice and good conscience, as well as by the law, be held estopped from claiming any irregularities in the issuance, delivery or sale of said bonds that could or might invalidate the same in the hands of your orator, who is an innocent holder for value without notice or knowledge of any irregularity in the authorization, issuance or sale thereof, or in any matter whatsoever affecting the same; and your orator verily believes that unless the said defendants and each of them, are restrained and enjoined by this Honorable Court, they will not only divert or appropriate for other uses, or return to the taxpayers the moneys collected as aforesaid for the payment of interest on said bonds, but will allow default to be made in the steps and proceedings required to be taken by them in order to make legal or valid the sale of property in said District for delinquent taxes, and will permit the taxpayers who have paid no taxes to wholly escape the penalties of such default and escape the payment of such taxes, and will institute or encourage proceedings to be instituted and actions to be commenced against the District attacking the validity of said bonds, all of which will render the bonds held by your orator, and the other bonds of said District issued as aforesaid, unsalable, and will greatly depreciate, if not entirely

destroy, the market value thereof, and will result in numerous suits and long and protracted litigation and otherwise cause great and irreparable injury to your orator and other holders of the bonds of said District.

IN CONSIDERATION WHEREOF, and forasmuch as your orator is without adequate remedy, save in a Court of Equity, your orator prays this Honorable Court to issue its writ of subpoena in due form of law, directed to the said Emmett Irrigation District and W. H. Shane, N. B. Barnes and E. J. Reynolds as Directors, and R. B. Shaw as Treasurer of said Emmett Irrigation District, defendants aforesaid, commanding them, and each of them, at a certain day and under a certain penalty to be therein specified, to appear before this Honorable Court to answer all and singular the matters and things hereinbefore set forth and complained of. But the answer to the bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that the said defendants, and each of them, may be restrained by injunction, preliminary until further hearing and perpetual thereafter, from diverting or otherwise appropriating or using for any purpose other than for the payment of interest on the bonds of said District the moneys collected for or hereafter paid into the interest fund created for the payment of interest on the bonds of said District issued as aforesaid, and that said defendants be required to apply the money in

said interest fund to the payment of the interest due on the bonds of said District, and that they, and each of them, be restrained and enjoined from fomenting, instigating, or encouraging by their acts, statements, conduct or otherwise, suits or actions to be instituted or commenced against the District or the holders of its bonds attacking the validity of the bonds or coupons issued as herein alleged, or enjoining the payment thereof or the payment of the interest thereon, and from counselling, advising or in any manner encouraging default on the part of taxpayers in the payment of the taxes levied as herein alleged for the payment of interest on such bonds, and from doing any act or thing whatsoever which can or may depreciate the market value of said bonds and the interest coupons thereto attached, and that they be enjoined and restrained from allowing or permitting default to be made in the proceedings or any of the proceedings required to be taken or the acts to be performed under the laws of the State of Idaho in order to accomplish a valid sale of property in said District for delinquent taxes under the levy made by said Board for the payment of interest on the bonds of said District, and that they, and each of them, be enjoined from instituting any proceedings or making any defense to any suit or action instituted by others attacking the validity of the bonds held by your orator or of the coupons thereto attached; and that upon final hearing it may be adjudged and decreed that all the bonds of said District of the said issue and series are legal and valid

obligations of said District, and that payment thereof and of the interest coupons thereto attached must be made at the time and in the manner therein provided; and that your orator may have such other and further relief as the nature and circumstances of the case may require, and as to this Court shall seem just and equitable.

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW,
Solicitors for Complainant.

Office and Post Office Address:
Idaho Building, Boise, Idaho.

United States of America,
District of Idaho.—ss.

OLIVER O. HAGA, being duly sworn, deposes and says: That he is one of the solicitors for J. Paul Thompson, plaintiff above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that he believes the same to be true; that he makes this affidavit and verification for and on behalf of said plaintiff for the reason that said plaintiff is absent from the said District, and this affiant further says that he has obtained his information relative to the matters set forth in said bill of complaint from official records and letters and other communications received concerning such matters from sources which he believes to be reliable.

OLIVER O. HAGA.

Subscribed and sworn to before me, this 10th day of March, 1914.

EDNA L. HICE,

(Seal)

Notary Public.

Endorsed: Filed March 10, 1914.

A. L. Richardson, Clerk.

By E. B. Yarrington, Deputy.

(Title of Court and Cause.)

No. 479.

AMENDMENT TO BILL.

Now comes the plaintiff under leave of Court first had and obtained, and amends his Bill of Complaint herein as follows:

First: By striking out in Paragraph XVI of said bill in the first and second lines thereof the words "for some reason unknown to your orator the said defendants," and inserting in lieu thereof the following: "the defendants wrongfully and without cause."

Second: By inserting a new paragraph to be numbered Paragraph XIX at the end of Paragraph XVIII and between said Paragraph XVIII and the prayer of said bill, to read as follows:

XIX.

Your orator further shows that the said defendants sometimes contend that a portion of the bonds, to-wit: about one-fifth thereof, issued by said Emmett Irrigation District were issued or sold by said District without any consideration, or any adequate

consideration being paid therefor, but said defendants do not state or pretend to know which of said bonds were so issued and do not identify them by number or otherwise so that any of the present holders of said bonds or any other person can learn or ascertain what bonds the said defendants refer to or contend were sold illegally or without adequate or any consideration having been paid therefor, and by reason of such general, vague and indefinite charges against the outstanding bonds of said District a cloud is thrown upon the validity or legality of all the bonds of said District so outstanding, including the bonds held by your orator, and the market value of all of such bonds is thereby greatly depreciated, if not entirely destroyed, but your orator is informed and believes and alleges the fact to be that such contentions or charges are wholly unfounded and untrue and are made only for the purpose of furnishing some excuse or pretense for not paying interest on any of the bonds issued by said District and for defaulting in the payment of such tax and for doing the other acts and things hereinbefore set forth and charged against the said defendants; that such false and unfounded charges, made as aforesaid by the officers of said District against the bonds so issued and outstanding, have been widely circulated and are frequently made and repeated, and as a result thereof defaults are being made by the taxpayers in the payment of the taxes levied for the payment of interest on said bonds, and the contentions, agitation and controversies over the

validity of said bonds and over the payment of such taxes are becoming general throughout said District and reports thereof are being circulated by taxpayers in and officers of said District among financial institutions and investors dealing in such bonds, and your orator verily believes that numerous suits will be instituted by taxpayers in said District attacking the validity of such bonds and the validity of the assessments made for the payment of interest thereon, and statements have repeatedly been made by officers of said District and by some of the defendants herein that the District will not pay said bonds unless compelled to do so by a decree or judgment of Court; that one suit has already been instituted in the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County by one Clayton B. Knox against the said R. B. Shaw as Treasurer of the said Emmett Irrigation District for an order restraining said defendant as Treasurer of said District, from collecting or attempting to collect any tax from said plaintiff for the payment of interest on said bonds, or any of them, or from advertising plaintiff's land for sale and from issuing any certificate of sale or tax deed thereto, because of the failure of plaintiff to pay such tax; that such suit is still pending before said Court undetermined and without any order or decree having been entered therein. And your orator believes that other suits by other taxpayers or other persons interested in said District or officers of said District will be instituted at any time involving the validity of such tax

and the validity of said bonds and final judgments or decrees may be entered therein against said District or the officers thereof affecting the validity of said bonds and the collection of taxes for the payment of the interest or principal of said bonds, all without notice to or knowledge thereof by the holders of said bonds, who are widely scattered and who reside mostly, if not entirely, in other States than the State of Idaho and at such distances from the place where such suits will be brought that they could not except by the merest chance, learn such suits had been brought or were pending; and your orator further shows that because of the attitude of the said defendants towards the said bonds no adequate or proper defense to such suits will be made by said defendants.

J. PAUL THOMPSON,
By RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Complainant.

Post Office Address: Idaho Building, Boise, Idaho.
United States of America,
District of Idaho.—ss.

Oliver O. Haga, being first duly sworn, deposes and says, that he is one of the solicitors for J. Paul Thompson, plaintiff above named; that he has read the foregoing amendment to plaintiff's Bill of Complaint and knows the contents thereof and believes the same to be true; that he makes this affidavit and verification for and on behalf of said complainant for the reason that said plaintiff is absent from said

District; and this affiant further says that he has obtained his information relative to the matters set forth in said amendment from official records and letters and other communications received concerning such matters, and from sources which he believes to be reliable.

OLIVER O. HAGA.

Subscribed and sworn to before me, this 5th day of June, 1914.

EDNA L. HICE,

(Seal)

Notary Public.

Endorsed: Filed June 6, 1914.

A. L. Richardson, Clerk.

By E. B. Yarrington, Deputy.

(Title of Court and Cause.)

No. 479.

ANSWER OF EACH AND ALL OF THE ABOVE
NAMED DEFENDANTS TO THE BILL OF
COMPLAINT OF THE ABOVE NAMED
PLAINTIFF.

I.

Answering paragraph one of said complaint said defendants say: That the said defendants, and each of them, are without knowledge as to whether or not the plaintiff is a citizen and resident, or citizen or resident of the State of Ohio, or as to whether or not said plaintiff resides in the City of Cleveland in the State of Ohio.

II.

Answering paragraph two, three and four of said

bill of complaint, said defendants, and each of them, admit all the allegations contained in said paragraphs.

III.

Answering the allegations contained in paragraph five of said complaint, said defendants and each of them admit each and all the allegations of said paragraph, save and except the allegation that the matter in controversy in this suit is wholly between citizens of different states, as to which said allegation defendants and each of them are without knowledge.

IV.

Answering the allegations of paragraph six and seven of said complaint, the said defendants, and each of them, admit the allegations contained in said paragraphs.

V.

In answer to the allegations contained in paragraph eight of said complaint, the defendants, and each of them, deny that thereafter, or at any other time, the said Emmett Irrigation District, acting by or through its board of directors, or otherwise, caused the bonds, or any bonds of said district, authorized as aforesaid, or otherwise, to be issued, sold and delivered, or to be issued or sold or delivered, to the amount of \$900,000.00, or upwards, or any other amount, or at all, except as hereinafter set forth.

VI.

Answering the allegations contained in paragraph nine of said complaint, the defendants admit that

the bonds authorized by vote of the district were coupon bonds, negotiable in form; deny that the said bonds authorized were payable to bearer; deny that the bonds authorized were authorized in denominations of \$100, \$500, and \$1,000, respectively, or in either or any of said denominations, and allege the fact to be that no denominations for said bonds authorized were ever fixed or authorized by the said District; deny that said, or any, bonds or coupons were authorized by said District, which, with or without exception as to number, amount and date of maturity, or number, or amount, or date of maturity, or any other exception, were identical in form, or otherwise, or in like tenor and effect, or tenor or effect, with the copy of bond and coupon set forth in paragraph nine of said complaint, or which were in words or figures, or substantially, or otherwise, as set forth in paragraph nine of said complaint, except as hereinafter set forth; and, in this connection, the defendants allege the fact to be that no form of bond or coupon was ever authorized by said District; deny that any bond or bonds whatever, or any coupons attached to said or any bonds, were issued as provided in Section 2397 of the Revised Codes of Idaho, or as is alleged in paragraph nine of said complaint, or otherwise, except as hereinafter set forth.

VII.

In answer to the allegations contained in paragraph ten of said complaint, the defendants deny that either the said, or any, bonds were signed by

the president and secretary, or president or secretary of the said Emmett Irrigation District, or the seal of said board of directors or of said district affixed thereto, except as hereinafter set forth.

VIII.

Answering the allegations contained in paragraph eleven of said complaint, these defendants deny that, relying upon the decision of the Supreme Court of the State of Idaho, in the case in said complaint referred to, wherein said Emmett Irrigation District was respondent and the said W. H. Shane was appellant, or relying upon the decision of the District Court of the Seventh Judicial District of the State of Idaho in and for Canyon County in said cause, or relying also, or otherwise, upon the recitals contained in said bonds, as alleged in said paragraph eleven of said complaint, or without notice of knowledge of any fact whatsoever impairing the validity of said bonds, or any of the foregoing, or otherwise, said plaintiff purchased, prior to January 1st, 1914, or at any other time, or at all, for a valuable, or any other, consideration, the said bonds, or any bonds of the said District, issued as aforesaid, or otherwise, to the amount of \$101,000.00, or any other sum; deny that the decision of the Supreme Court of the State of Idaho, in the case referred to in said complaint, wherein the said W. H. Shane was appellant and the Emmett Irrigation District was respondent, or that the decision of the District Court of the Seventh Judicial District of the State of Idaho, in and for Canyon County, in said cause, either held, ad-

judged or decreed that the said, or any, bonds were, or are, now, the valid or bonded obligation of said District; and, in this connection, the said defendants are informed and believe, and hence on information and belief allege, that the said plaintiff gave no consideration whatever for the bonds noted and set forth in said complaint, and that if said plaintiff is the holder of the said bonds, or either of them, or any other bonds of the said Emmett Irrigation District, that said plaintiff had full notice and knowledge of all the facts in this answer herein set forth at the time he acquired the same.

Further answering the allegations contained in said paragraph eleven of said complaint, and in particular the allegation that the said plaintiff now is, and ever since has been, the owner and holder of said bonds described in the complaint, of the number and denomination set forth in said paragraph eleven, or any other bonds of the said Emmett Irrigation District, these defendants say, that as to the facts set forth in said allegation they are without knowledge.

IX.

Answering the allegations contained in paragraph twelve of said complaint, these defendants deny that the said District, at any time, sold, issued or delivered said, or any, bonds, except as hereinafter set forth; deny that any irrigation works were purchased or constructed, acquired or paid for by the proceeds of the sale of said, or any, bonds, or that any proceeds whatever were received by said District for the sale of any bonds, except as hereinafter set forth;

deny all other allegations contained in said paragraph twelve.

X.

In answer to the allegations set forth in paragraph thirteen of said complaint, defendants, and each of them, deny that all or any interest accruing on the said, or any, bonds, evidenced by interest coupons thereto attached, as aforesaid, or otherwise, maturing January 1st and July 1st, or January 1st or July 1st, of each year, or any other time, has been paid, except as hereinafter set forth; admit the interest coupons maturing January 1st, 1914, have not been paid; deny that any interest has accrued on said, or any, bonds or coupons, and deny that any interest is due plaintiff on any bonds or coupons, or bonds or coupons of the Emmett Irrigation District; and, further answering the allegation that the amount of such interest coupons attached to the bonds held by plaintiff aggregate the sum stated in said paragraph, these defendants say that they are without knowledge as to whether or not said or any bonds, or coupons, of the Emmett Irrigation District, are held by said plaintiff.

XI.

Answering the allegations contained in paragraph fourteen of said complaint, these defendants admit all the allegations therein contained.

XII.

Answering the allegations contained in paragraph fifteen of said complaint, these defendants admit

all the allegations contained in said paragraph fifteen, except the allegation that the board of directors of said District have allowed default to be made in the payment of interest, and the allegation that the said District is now in default in the payment of said coupons, and, in answer to said allegations, these defendants say: That no interest is due from said District to any person or persons on any bonds or coupons of said District, save and except as hereinafter set forth.

XIII.

Answering the allegations contained in paragraph sixteen of said complaint, said defendants, and each of them, deny that they, wrongfully and without cause, or wrongfully or without cause, declined to apply the moneys collected from the taxpayers of said District with which to pay interest, to the payment of the interest due on said bonds, or the coupons held by said plaintiff; deny that any interest is due on said bonds or coupons held by said plaintiff, and as to whether or not any bonds or coupons are held by said plaintiff, defendants and each of them are without knowledge; deny that unless enjoined and restrained, or enjoined or restrained, by this Honorable Court, or otherwise, the said defendants, or any of them, will either return such, or any, money to the persons from whom the same was collected or who paid the same to the Treasurer for the use of said interest fund, or any other person, or that said defendants, or any of them, will divert such, or any, money from said interest fund, or use it for other

purpose or purposes; deny that said defendants, or either of them, will not apply said money to the payment of interest or to any purpose for the benefit of the holders of said bonds.

XIV.

Answering the allegations contained in paragraph seventeen of said complaint, said defendants, and each of them, deny that default in payment will be made by the said defendants, or any of them, from time to time as each installment of interest becomes due and payable, or otherwise, or at all, in any case where interest is lawfully due from said District; deny, that in order to avoid great loss and injury to plaintiff, or to any holder of said or any bonds of said District, it is necessary to have said bonds declared, without delay, or otherwise, to be the legal and valid, or legal or valid, obligation of said District, or to have appropriate process, or any process for enforcing the payment of interest or principal thereon as the same becomes due from time to time, or at any other time or at all.

XV.

Answering the allegations contained in paragraph eighteen of said complaint, these defendants deny that the officials of said District are counselling and advising, or counselling or advising the taxpayers in said District not to pay their taxes levied for the purpose of paying interest on said bonds, or otherwise; deny that said officials are making no effort to collect the payment of said taxes; deny that by their

actions, conduct and statements, or by their actions, or conduct, or statements, said officials are encouraging default in the payment of such or any taxes; deny that they are encouraging agitation or litigation against the bondholders; deny that they are fomenting a spirit of repudiation among the taxpayers, with a view of ultimately repudiating the payment of the bonds heretofore issued, together with the interest thereon, or otherwise, including the coupons held by plaintiff, as aforesaid, or otherwise; deny that they are inviting suits by taxpayers of said District, attacking the validity of such bonds, or the right of the District to pay such bonds, or the interest thereon, or otherwise; deny that said defendants by their conduct and actions, or conduct or actions, or otherwise, are greatly, or otherwise, decreasing the market value of said, or any, bonds; deny that said defendants are causing irreparable, or any, injury, to the plaintiff in the premises, or otherwise, or to other, or any, holders of the bonds of said District; deny that the said defendants, or any of them, should, in justice and good conscience, or justice or good conscience, or by law, or otherwise, be held responsible for claiming any irregularities in the issuance, delivery or sale of said bonds that could or might invalidate the same in the hands of plaintiff, or otherwise; further answering, these defendants say that they are without knowledge as to whether or not said plaintiff is a holder of said or any bonds of said District, but deny that the said plaintiff is an innocent holder, or a holder for value, or a holder

without notice and knowledge, or notice or knowledge, of any irregularities in the issuance and sale, or issuance or sale of said bonds; deny that the said defendants, or any of them, unless restrained and enjoined, or restrained or enjoined by this Honorable Court, or otherwise, will divert or appropriate, for other uses, or at all, or return to the taxpayers moneys collected as aforesaid, or otherwise, from the payment of interest on said or any bonds; and deny that they, or any of them, will allow default to be made in the steps and proceedings, or steps or proceedings, required to be taken by them in order to make legal and valid, or legal or valid, the sale of property in said District, for delinquent taxes, or otherwise, or that they will permit the taxpayers, or any taxpayer, who have paid no taxes, to wholly, or otherwise, escape the penalty of such or any default, or to escape the payment of such, or any taxes; and deny that they, or any of them, will institute or encourage proceedings to be instituted, or actions to be commenced against the District, attacking the validity of said, or any, bonds; and deny that said, or any action, by these defendants, or any of them, will render the bonds of said District, or any of them, unsalable, and will greatly, or otherwise, depreciate, or entirely, or otherwise, destroy the market value of said or any bonds, or will result in numerous, or any, suits, or long or protracted litigation, or cause great and irreparable, or great or irreparable, or any injury to plaintiff, or to any holder of the bonds of said District.

XVI.

Answering the allegations contained in amendatory paragraph nineteen of said complaint, these defendants, and each of them, deny that any bonds were at any time issued by said District, save and except as hereinafter set forth; but admit that said defendants contend that about one-fifth of the bonds purported to have been issued by the said Emmett Irrigation District, were purportedly issued and sold by said District without any consideration, as hereinafter set forth; admit that the said defendants do not state or pretend to know which of said bonds were so issued, as alleged in said paragraph nineteen, as hereinafter and for the reasons hereinafter more fully set forth.

Further answering said allegations, said defendants are informed and believe, and hence on information and belief allege, that the bonds described in plaintiff's complaint, held by him, are a portion of the bonds thus issued, without consideration, as hereinafter more fully set forth; deny that by reason of such general, vague and indefinite, or general, or vague, or indefinite charges against the outstanding bonds of said District, a cloud is thrown upon the validity or legality of all the bonds of said District so outstanding, and in this connection the said defendants are informed and believe, and hence on information and belief allege, that it is well known to holders, or purported holders, of the bonds of said District, which of said bonds were purportedly issued without any charge or any adequate consider-

ation, as hereinafter more fully set forth; deny that the market value of all said bonds of said District is greatly or generally depreciated or entirely destroyed, or otherwise destroyed, by reason of the matters set forth in said paragraph nineteen; deny that the contentions or charges set forth in said paragraph nineteen are wholly, or otherwise, unfounded, or untrue; deny that the same are made only, or at all, for the purpose of furnishing either excuse or pretense for not paying interest on all or any of the bonds issued by said District, or for defaulting in the payment of taxes therefor, or for doing any other act or thing set forth or charged against the said defendants in plaintiff's complaint; deny that as a result thereof, or for any other reason, except as hereinafter set forth, defaults are, or any default is, being made, by the taxpayers, or any taxpayers, in any of the taxes levied for the payment of interest on said, or any, bonds; deny that numerous, or any suits will be instituted by taxpayers, or any taxpayer in said District attacking the validity of such or any bonds, or attacking the assessment, or any assessment, made for the payment of interest thereon; deny that any statement or statements have, repeatedly, or otherwise, been made by officers, or any officer of said District, or by any defendant, that the District will not pay said bonds, or any bonds, unless compelled to do so by a decree or judgment of the Court, except as to bonds illegally issued, as hereinafter set forth; admit the institution of the action of Clayton B. Knox against R. B. Shaw as Treasurer

of said Irrigation District, as set forth in said paragraph nineteen.

Further answering said paragraph nineteen, these defendants are without knowledge as to whether or not the holders of said bonds are widely scattered, or whether they reside mostly if not entirely in other states than the State of Idaho, and as to whether or not they reside at such distances from said place where such suits will be brought that they could not, except by the merest chance, learn that such suits had been brought or were pending; deny that because of the attitude of said defendants toward said bonds, or otherwise, no adequate or proper defense will be made by said officers.

Further answering the allegations contained in said complaint, these defendants say, as follows, to-wit:

I.

At a special election, held in the said Emmett Irrigation District on the 3d day of December, 1910, irrigation district bonds in the total sum of \$1,100,000.00, for the purpose of providing funds for the purchase and enlargement of the irrigation system known as the Canyon Canal system, for the watering of the lands in said district, were duly authorized.

II.

That, on the 12th day of September, 1911, the Board of Directors of said Emmett Irrigation District made and entered into a certain purported contract in writing with — Emmons and J. J. Cor-

kill, doing business under the firm name and style of J. J. Corkill & Company, a true and correct copy of which said contract, marked Exhibit "A", is attached hereto, hereby referred to and made a part hereof.

III.

That, thereafter, on the 26th day of September, 1911, the said Fort Dearborn Trust and Savings Bank, the depository named in said purported contract, Exhibit "A", and the said J. J. Corkill & Company and said Emmett Irrigation District entered into an agreement supplemental to said contract, Exhibit "A", for the purpose of more clearly defining the duties and responsibilities of the said depository, in which said supplemental agreement it was mutually promised and agreed by the aforesaid parties thereto that the duties of the said Bank should be limited to that of a mere depository.

IV.

That the said Board of Directors were induced to make, and did make, said contract hereinbefore referred to by reason of and relying upon the representations of J. J. Corkill & Company that the said bonds and notes and other obligations referred to, specified in the said contract, Exhibit "A", as the various outstanding obligations of said Canyon Canal Company, were valid liens, secured by mortgage or otherwise, upon the irrigation system of said Canyon Canal Company, which was to be transferred to defendants, under the terms of said contract, and further secured by mortgage water contracts upon

the principal portion of the lands of said Emmett Irrigation District, and that said Canyon Canal Company was actually indebted in the amounts named in the said contract Exhibit "A", in the manner specified in said contract, when in truth and in fact, as defendants are informed and believe, and therefore upon information and belief allege, said bonds and notes and other outstanding obligations issued by said Canyon Canal Company, and referred to in said contract Exhibit "A", were in no way secured by any valid or subsisting lien against said irrigation system of the said Canyon Canal Company; and defendants further allege that they are informed and believe, and hence on information and belief allege, that the said bonds and notes and other outstanding obligations of the said Canyon Canal Company, referred to in said contract Exhibit "A", were valueless in the hands of the holder thereof, at the time of the execution of said contract hereinbefore referred to, and that the same were secured only by water contract mortgages executed by the owners of said lands in said irrigation district to said Canyon Canal Company, prior to the organization of said district, all of which said water contract mortgages had been violated and breached by the said Canyon Canal Company, and all of said water contracts were subject to extensive offsets, in an amount unknown to these defendants, in favor of the land owners executing the same.

Defendants are informed and believe, and hence on information and belief allege that said Corkill &

Company represented to said Board of Directors that the services of the said Corkill & Company were necessary and indispensable to said defendant in securing the exchange of the various obligations of said Canyon Canal Company, referred to in said contract Exhibit "A", by the holders thereof for the bonds of the District and in securing the transfer of the said irrigation system known as the Canyon Canal system for said bonds, and, further, that the said Corkill & Company were in position to render the said defendant valuable services in accomplishing the aforesaid transfer and exchanges, and that the said Corkill & Company were acting for and in behalf of, and in the interest of, the said defendants, all of which said representations were believed by said Board of Directors to be true, at the time said aforesaid contract was made, but all of said representations were false, and known by the said Corkill & Company to be false at the time they were made, and each and all of which were fraudulently made, with intent and purpose on the part of Corkill & Company to induce said Directors to make and enter into said contract hereinbefore referred to.

Said defendants are informed and believe, and hence on information and belief, further allege, that, at the time of the making the said aforesaid representations and of entering into said contracts, hereinbefore referred to, the said Corkill & Company, unknown to said Board of Directors, or any of them, were acting as special agents and representatives and in behalf of, and at the request of the various

holders of the aforesaid obligations of the Canyon Canal Company, referred to in said contract, Exhibit "A," and that at the time said contract was made and entered into, and at all times thereafter, the facts in this paragraph hereinbefore set forth were well known to the said holders of said obligations.

V.

That, thereafter, the then Board of Directors of said District delivered to the said Fort Dearborn Trust & Savings Bank, the depositary named in the aforesaid contract, Exhibit "A", pursuant to and under the terms and conditions of said contracts hereinbefore mentioned, certain instruments in writing, purporting to be the coupon bonds of the said Emmett Irrigation District in the total sum of \$1,-100,000.00, par value, exclusive of interest, \$800,-000.00 in amount thereof being thus deposited on or about January 3d, 1912, and \$300,000.00 thereof on or about February 29th, 1912, and defendants are informed and believe, and hence on information and belief allege, that the bonds and coupons upon which said action is brought are a portion of the said bonds so deposited with the said depositary.

VI.

Defendants further allege that the said bonds, thus delivered to the said depositary were designated on their face as a single series, and, as defendants are informed and believe, and hence on information and belief allege, the entire series designated as a single issue; further, the bonds comprising said, or any issue, were not numbered consecutively, com-

mencing with those first falling due; and further, upon such information and belief, defendants allege that no portion of said purported bonds, constituting a single issue are payable, five per cent. of the whole number of bonds constituting said issue at the expiration of eleven years from their issuance, six per cent. at the expiration of twelve years from their issuance, seven per cent. at the expiration of thirteen years from their issuance, eight per cent. at the expiration of fourteen years from their issuance, nine per cent. at the expiration of fifteen years from their issuance, ten per cent. at the expiration of sixteen years from their issuance, eleven per cent. at the expiration of seventeen years from their issuance, thirteen per cent. at the expiration of eighteen years from their issuance, fifteen per cent. at the expiration of nineteen years from their issuance, or sixteen per cent. at the expiration of twenty years from their issuance, nor in any such proportions, as required by statute of the State of Idaho, and upon such information and belief, defendants further allege that the foregoing allegations are true, whether or not allowance be made so that each bond shall be in amount of \$100.00 or a multiple thereof, and no bond should fall due in partial payments.

Defendants further say that all of said purported bonds were signed by the President and Secretary of the said District in office at the time the same were authorized, but none of the said purported bonds, delivered to the said depositary, are now, or at any

time have been, signed by the President and Secretary of the District in office at the time the same were delivered to the said depositary, or thereafter, and none of the coupons attached to said bonds at the time of their delivery, or at any other time, are now, or at any time have been, signed by the Secretary of said defendant District in office at the time the same were delivered to said depositary or thereafter, but that the same were signed by the Secretary in office at the time of their authorization; that neither the Secretary or Treasurer of said District has now, or at any time has had or kept, any record whatever of bonds sold, or their manner or date of sale, or price received, or the name of the purchaser; that neither the said defendant District, nor anyone in its behalf, now has, or at any time has had, or kept any record of said facts; and defendants are informed and believe, and hence on information and belief allege, that in making and procuring said contract from said Irrigation District it was the purpose and intent of the said Corkill & Company to unlawfully and fraudulently withhold and conceal from the said Irrigation District and from the landowners and taxpayers therein the identification of the different bonds contained in the classification into which said bonds were divided by said contract, Exhibit "A," as well as the names of the purchasers or receivers thereof.

VII.

Defendants further allege that they are informed and believe, and hence on information and belief allege that thereafter, during the year 1912, the exact date being to these defendants unknown, but after the 1st day of March in said year certain of the said purported bonds thus placed in the hands of the said depository were disposed of by said depository as follows:

(a) Approximately \$600,000.00 in amount, at par value, exclusive of interest, of said purported bonds were exchanged by the said depository for the outstanding obligations of said Canyon Canal Company, referred to in said contract, Exhibit "A."

(b) \$150,000.00 in amount of the said bonds, at the par value thereof, together with the January 1st, 1912, and all subsequent maturing interest coupons attached thereto, were, after the said 1st day of March, 1912, and during said year the exact time being to these defendants unknown, delivered by the said depository to the said J. J. Corkill & Company, without consideration, but purportedly as a bonus or premium for making the exchange of bonds for the said obligations of the said Canyon Canal Company, as hereinbefore set forth.

(c) \$105,000.00 in amount of said bonds, at par value, exclusive of interest, were from time to time, after the 1st day of March, 1912, and during said year, the exact date being to these defendants unknown, delivered to said Corkill & Company for cash; and defendants further allege, upon said informa-

tion and belief, that said depositary, from time to time, as the last mentioned bonds were delivered to said Corkill & Company for cash, delivered to said Corkill & Company, in addition to the said bonds delivered for cash, purportedly as a bonus or premium for making the said exchanges of the bonds hereinbefore set forth, but actually without any consideration whatever, approximately the sum of \$26,200.00 in amount of said bonds at the par value thereof.

(d) That thereafter, on or about the 1st day of September, 1912, said depositary, pursuant to the mutual agreement between the said District and the said Corkill & Company, returned to the said District \$25,000.00 in amount of said bonds, at their par value, exclusive of interest, which said bonds are now held and owned by the said District.

(e) That thereafter, to-wit, on or about the 5th day of April, 1913, the said Corkill & Company, pursuant to the terms and conditions of a subsequent contract, made and entered into between the said District and the said Corkill & Company, purchased from said District \$20,000.00 in amount of said bonds at their par value, exclusive of interest, for cash, said bonds being a portion of the bonds then remaining in the hands of the said depositary.

VIII.

Defendants are informed and believe, and hence on information and belief allege, that \$173,800.00 in amount, at par value, exclusive of interest, of said bonds originally delivered to said depositary, as hereinbefore set forth, still remain in the hands of

the said depository, and that the said defendant, Emmett Irrigation District, has received in cash, for and on account of the \$1,100,000.000 in amount of bonds deposited with the said depository the sum of \$125,000.00, and no more.

IX.

Defendants are further informed and believe, and hence on information and belief allege, that the bonds and coupons upon which this suit is brought are no part of the bonds or coupons sold or delivered for cash.

X.

Defendants further allege that the interest coupons attached to the said bonds, maturing July 1st, 1913, were paid by the Board of Directors of said District from funds raised otherwise than by taxation for the purpose of interest payment, and that no other interest or interest coupons have been paid by said District.

XI.

Defendants are further informed and believe, and hence on information and belief, allege that the said Board had no power or authority to issue said or any bonds, for any purpose, or for any consideration, other than the exchange of cash, at their par value with accrued interest; and, in this connection, that Section 12-A of a certain purported act of the Ninth Session of the Legislature of the State of Idaho, which appears in the 1907 Session Laws at page 484 to page 507, both inclusive, being Senate Bill No. 140, and purported to

have been enacted at the Ninth Session of the said State Legislature and approved by the Governor of said State on the 15th day of March, 1907, which act purports to provide, in Section 12-a thereof that, "in case of purchase the bonds of the district hereafter provided for may be used to their par value in payment," (1907 Session Laws, p. 493), is unconstitutional and void, in that the subject thereof is not expressed in the title of said Act, and it is not provided in the body of said act that the aforesaid Section 12-a thereof, shall be enacted or become a law of the State of Idaho.

XII.

Further answering, and for a further and separate defense to the plaintiff's said action, and reserving to themselves all manner of exceptions, objections and advantages on the same point as heretofore raised by said defendants on motion to dismiss the plaintiff's bill of complaint as amended, these defendants and each of them allege, that this court, sitting as an equity court and on the equity side thereof, has no jurisdiction of the cause of action, if any, of the matters and things set forth in the plaintiff's said bill of complaint, for the reason that said plaintiff has a plain, speedy and adequate remedy at law against the defendant, the Emmett Irrigation District, for judgment upon the default of coupons owned by the plaintiff with the right to enforce such judgment, if any be recovered, by writ of mandate issued from this court.

XIII.

Further answering, and for a further and separate defense to the plaintiff's said cause of action, if any, and reserving to themselves all manner of exceptions, objections and advantages to be had on this point as raised by defendant's motion to dismiss said bill of complaint, for the reasons in this paragraph hereinafter set forth, these defendants and each of them allege that the plaintiff's complaint is defective for want of, and by reason of a misjoinder of, necessary and indispensable parties, in that it is alleged in plaintiff's said complaint as amended that the bonds of said Emmett Irrigation District, described in said complaint as amended to the amount of \$900,000 and upwards, together with interest coupons of like date, number, amount and maturity as the coupons described in plaintiff's complaint as belonging to the said plaintiff have been issued and are now outstanding in the hands of purchasers thereof, who reside mostly if not entirely in other states than the State of Idaho, and that the plaintiff herein is the owner of but a portion of said bonds, to-wit, the amount of \$101,000, together with interest coupons thereto attached including therein interest coupons attached to said bonds held by plaintiff, representing interest due thereon on January 1st, 1914, which interest remains unpaid and aggregates the sum of \$3,030.00, and the Treasurer of said District is now in possession of an interest fund belonging to said District and collected and held in trust for the payment of the coupons attached to all of said bonds outstanding,

including bonds and coupons of all holders of any portion of the said \$900,000.00 of bonds issued; and defendants further allege that certain instruments purporting to be the bonds of the Emmett Irrigation District, together with interest coupons representing interest maturing January 1st and July 1st of each year thereunto attached in an aggregate amount of \$900,000.00 principal or thereabouts are outstanding; that plaintiff's said bonds and coupons are a portion thereof; that said bonds and coupons were issued in the manner and for the consideration alleged in paragraphs one to ten of the affirmative matter set forth in defendant's first defense hereto, which said allegations in said ten paragraphs are hereby referred to and made a part hereof as fully as though set forth herein; further, defendants are informed and believe and hence on information and belief allege that the holders of said purported \$900,000 of bonds of the said District, together with the interest coupons thereto attached, are not numerous, nor are they so numerous as to make it impracticable to bring them all before this court as parties to this action, nor will the same be attended with inconvenience, extraordinary expense or serious delay; further, as alleged in said complaint, said persons, the holders of said purported bonds and coupons are citizens and residents of states other than the State of Idaho; that said bonds, if valid bonds, are each and all a lien upon the lands within said Emmett Irrigation District and the holders of the coupons thereto attached entitled to pro

rate in the distribution of the interest fund now in the hands of said Treasurer, that if other holders of said bonds and coupons proceed to the enforcement of said bonds and coupons elsewhere than in this action numerous suits will be required involving practically the same facts and the same questions; that, as appears by the plaintiff's said bill of complaint, this suit is brought for the purpose of apportioning said interest fund now in the hands of the said Treasurer of said District and to remove a cloud from the title of said outstanding bonds whose status is in the District of Idaho Southern Division and to enforce and establish the lien of said bonds upon the lands of said District; and that, therefore, the holders of said bonds who reside outside the State of Idaho are within reach of the process of this court; that the names, citizenship and residence of each of the holders of said bonds other than the plaintiff herein and one A. N. Gaebler, whom defendants are informed and believe, and hence on information and belief allege, is a citizen of St. Louis in the State of Missouri and the holder of \$53,500 of said purported bonds together with the interest coupons thereto attached, are unknown to defendants and each of them, but said defendants, and each of them are informed and believe, and hence on such information and belief allege, that the names, residence and address of each of the holders of all said \$900,000 of bonds, together with the interest coupons thereto attached are known to the plaintiff, and that a committee has been appointed by the holders of each and all of said

bonds for the purpose of enforcing the purported obligation of the same together with the coupons thereto attached; and defendants and each of them are further informed and believe and hence on information and belief allege that said bonds and all of them have been deposited with said committee, the names of which said committee are unknown to defendants and each of them, but are known to said plaintiff and plaintiff's attorneys; further, on such information and belief, defendants and each of them allege that the said committee is trustee for each and all of said bondholders; that this action is instituted at the instance and request of said committee; that the said committee, acting for each and all of said bondholders, is contributing to if not entirely paying all expenses of this action.

Defendants are further informed and believe, and hence on information and belief allege that each and all of said committee are non-residents and not citizens of the State of Idaho, further, on such information and belief said committee has complete records of the names, residence and citizenship of each of the holders of said bonds and that the same are accessible to this plaintiff; that the controversy in plaintiff's complaint set forth cannot be fully and finally determined except the members of said committee and the remaining holders of said \$900,000 of said purported bonds and coupons be brought in as parties to this action.

WHEREFORE, these defendants, and each of

them, pray to be dismissed with their costs in this behalf incurred.

EMMETT IRRIGATION DISTRICT,
W. H. SHANE, N. B. BARNES AND
E. J. REYNOLDS DIRECTORS,
AND R. S. SHAW, TREASURER,
EACH AND ALL

BY DEAN DRISCOLL.

RICE, THOMPSON & BUCKNER,

Residing at Caldwell, Idaho, Solicitors for Defendants.

FREMONT WOOD, AND DEAN DRISCOLL,

Residing at Boise, Idaho, Solicitors for Defendants

Service of the within and foregoing answer by receipt of copy thereof this 5th day of October, 1915, is hereby acknowledged, and consent is hereby given that the time for filing same be extended to and including Oct. 6th, 1915.

RICHARDS & HAGA,
Residing at Boise, Idaho,
Attorneys for Plaintiff.

EXHIBIT "A"

THIS AGREEMENT, Made and entered into this twelfth day of September, A. D., 1811, by and between Emmett Irrigation District, 'a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, (hereinafter sometimes for brevity called the "District") par-

ty of the first part, and J. J. Corkill & Company, of Chicago, Illinois, parties of the second part, WITNESSETH that,

WHEREAS, the District has been organized under the laws of the State of Idaho, with the intention and purpose of acquiring, taking over and owning the irrigation system heretofore belonging to The Canyon Canal Company (the said Canyon Canal Company being hereinafter sometimes for brevity referred to as "Canal Company") located in the counties of Boise and Canyon, in the State of Idaho, which said irrigation system with the extensions contemplated, hereafter referred to, will provide for irrigation of all the lands which constitute a part of the District, and,

WHEREAS, in pursuance of such intent and purpose, the District desires to purchase the property of the said The Canyon Canal Company and that said parties of the second part are able to sell and to deliver to the District the said properties, all subject to the terms and conditions hereinafter set forth, and,

WHEREAS, the properties of the said Canyon Canal Company are subject to the following outstanding obligations:

First: \$170,000 par value in amount of Six Per Cent First Mortgage Gold Bonds, dated June 15, 1915, (said bonds being the unpaid portion of a total issue of \$350,000, par value in amount) which are due serially from July 1st, 1912, to July 1st, 1916, and which are secured by a mortgage bear-

ing even date with the said bonds to the American Trust and Savings Bank, a corporation of Illinois, as Trustee, and also by the deposit with said Trustee of first mortgage contracts constituting liens on lands irrigated by means of the said irrigation system and lying within the District, upon which contracts there was on May 1st, 1911, a total of \$227,603.54 principal, and \$38,094.08 interest unpaid.

Second: \$100,000 par value in amount of second mortgage collateral trust bonds issued by the said Canal Company, dated July 1st, 1906, which are due July 1st, 1916, bear interest at six per cent (6%) per annum and are secured by a "Collateral Trust Mortgage" bearing even date with the said bonds to the said The American Trust and Savings Bank as Trustee, on which said bonds no interest has been paid and the said bonds are therefore in default and subject to foreclosure.

Third: \$100,000 par value in amount of notes of the said Canal Company, dated December 15, 1908, due December 15, 1910, bearing interest at six per centum (6%) per annum, and secured by the deposits under a collateral trust agreement with the said The American Trust and Savings Bank as Trustee, of certain mortgage contracts constituting liens on lands irrigable from the said irrigation system and constituting a part of the District on which said mortgage contracts there was on May 1st, 1911, a total of \$101,111.10 principal and \$17,310.97 interest remaining unpaid, which said notes are in default and therefore subject to foreclosure.

Fourth: \$200,000 par value in amount of notes of the said Canal Company, dated May 1st, 1909, bearing interest at six per cent (6%) per annum, of which \$100,000 are due February 1st, 1912, and \$100,000 are due February 1st, 1913, and which are secured by the deposit under a trust agreement with the said The American Trust and Savings Bank as Trustee, dated April 20, 1909, of other similar mortgage contracts on which there were on the first day of May, 1911, \$196,754.98 principal and \$21,463.11 interest remaining unpaid, on which said notes no interest has been paid since February 1st, 1911, and said notes were, therefore in default and subject to foreclosure, and

WHEREAS, in addition to the mortgage contracts in the hands of the said The American Trust and Savings Bank to secure the respective issue of bonds and notes above described, there is in the hands of the said Trustee cash collected on said mortgage contracts as follows, namely: \$6,994.09 collected on contracts securing the first mortgage bonds of June 15, 1905; \$4,966.63 collected on the said mortgage contracts deposited as collateral for the said notes, dated December 15th, 1908; \$16,237.22 collected on contracts deposited as collateral for the said notes, dated May 1st, 1909, and

WHEREAS, the District has heretofore by proper proceedings had according to law, authorized the execution and sale of bonds of the District to the total of \$1,100,000, said bonds to bear interest at the rate of six per cent (6%) per annum, to be dated

January 1st, 1911, and to become due serially in the manner provided by the laws of the State of Idaho, which said bonds the said District desires to sell and use for the purpose of purchasing the properties of the said Canal Company; retiring all of the outstanding bonds and notes of the Canal Company, paying all valid and outstanding existing liens, charges and claims against the property of the said Canal Company, so that the said property may be held by the District free and clear of all liens whatsoever and to furnish funds for the extension of the said irrigation system and for the completion thereof, so as to constitute a complete irrigation system for the irrigation of all the lands contained in the District, and

WHEREAS, the said parties of the second part are able and are willing to assist the District in exchanging the bonds of the District for the said outstanding notes and bonds of the Canal Company, and also are willing to purchase the remainder of said bonds over and above those that are necessary to be used in affecting such exchange; NOW, THEREFORE, the said parties have agreed as follows:

Section 1. The said parties of the second part agree to use their best efforts with the holders of the outstanding bonds and notes of the said Canal Company and with the members of the committees heretofore organized for the protection of the above mentioned defaulted notes of the Canal Company in order to affect the complete exchange of the said

notes for the said bonds of the District and thereby to obtain the release of the above mentioned mortgages and collateral deposited as security for the said bonds and notes as above set forth.

Section 2. At or before the time when the District shall deposit with Depositary hereinafter named the bonds of the said District to be disposed of as hereafter set forth, the said parties of the second part are to transfer or cause to be transferred to the District (subject only to the liens of the said outstanding bonds and notes of the Canal Company and of the liens hereinafter mentioned) the entire irrigation system of the Canal Company, the said parties of the second part will also assign or cause to be assigned the unsecured claim or claims against the Canal Company held by Trowbridge & Niver Company. All necessary deeds and assignments to carry out the above mentioned transfers are to be executed and deposited by said parties of the second part with the Fort Dearborn Trust and Savings Bank of Chicago, Illinois, hereinafter referred to as the "Depositary," with instructions to deliver the same to the District or its order, upon the deposit by the District with the said Depositary of the said \$1,100,000.00 of District bonds (with the written opinion of Adams & Candee, Attorneys of Chicago, Illinois, approving the legality of the said bonds as hereinafter provided) in accordance with the terms of this agreement.

Section 3. The parties of the second part further agree that when the exchange of the said District

bonds for the said outstanding bonds and notes of the Canal Company shall have been completed and all of the notes and bonds of the Canal Company shall have been retired by means of such exchange, or in payment or otherwise, the said parties of the second part will then execute a proper assignment or assignments transferring and assigning to the said District all of the mortgage contracts and cash held by the said The American Trust and Savings Bank (now the Continental and Commercial Trust & Savings Bank) as Trustees, under the above mentioned mortgages and trust agreements. The said mortgage contracts amounted, (according to the statement of said Trustee), on or about May 1st, 1911, to the sum of \$525,469.62 principal, and \$76,868.16 interest (the said amounts being the amounts of principal and interest respectively, remaining unpaid upon said mortgage contracts) and the cash in the hands of the Trustee amounting (according to said statement) to \$28,197.94, making a total of \$630,535.72 of principal, interest and cash so to be transferred to the District. Such transfer and assignment shall be in such form as the District may request and shall authorize and direct the said Trustee to turn over to the District all such contracts and cash then remaining in its hands.

The parties of the second part will also at the same time execute or cause to be executed and deliver to the Depositary for delivery to the District an assignment of all of the right, title and interest now held and owned by Trowbridge & Niver Com-

pany in and to any of the stock of the Canal Company. Such assignment shall be made to a Trustee or Trustees named by the District in such manner as to enable the said Trustee or Trustees to control the Canal Company from that time forth in order that the property of the said The Canyon Canal Company may be fully and completely transferred to the District and that the Canal Company may be wound up, dissolved or otherwise disposed of as the District may desire and determine it being the intent hereof, that after the execution of such transfers which shall be made as soon as may be after the completion of the exchange and retirement of the outstanding bonds and notes of the Canal Company. The Canal Company and all of its property shall be wholly subject to the control of the District.

Section 4. The District agrees to deposit with the Depositary the entire issue of its said bonds amounting to \$1,100,000; said bonds are dated as above stated, January 1st, 1911, and bear interest at the rate of six per cent (6%) per annum, and mature serially in installments in the manner provided by the Statutes of the State of Idaho. The coupons attached to said bonds and maturing July 1st, 1911, are to be detached by the District prior to the deposit of the said bonds with the said Depositary.

Section 5. The said Depositary is to hold and shall be instructed to hold the bonds of the District so deposited with it and to deliver the same as follows:

(a) \$470,000 in amount of the said bonds are to be held by the Depositary and delivered from time

to time to the parties of the second part or their order, upon the surrender of any of the above mentioned bonds, dated June 15, 1905, or notes dated December 15, 1908, or notes dated May 1, 1909; the par value of the bonds of the District so to be delivered to be equal to the par value of the above mentioned bonds and notes so surrendered.

The accrued interest on all of the above mentioned outstanding bonds and notes will at all times exceed the accrued interest (since July 1, 1911) on the bonds of the District to be delivered in exchange therefor. The accrued interest on the bonds of the District is to be allowed as a credit on the accrued interest of the aforesaid bonds and notes so surrendered and the accrued interest on the aforesaid bonds and notes so surrendered in excess of the accrued interest on the bonds of the District delivered in exchange therefor, shall be paid in cash by the parties of the second part to the persons surrendering such bonds and notes for such exchange; provision being hereinafter made for the reimbursement of the said parties of the second part for the amount of the accrued interest so expended by them.

(b) \$130,000 par value in amount are to be delivered from time to time to the parties of the second part or their order, upon the surrender of the said \$100,000 of second and collateral trust bonds; the par value of the District bonds so delivered to equal the par value of the said notes so surrendered together with accrued interest thereon to July 1st, 1911, (the total interest accrued on such notes to July 1st, 1911,

amounting to the sum of \$30,000). The parties of the second part are to make arrangements with the persons surrendering such notes for the necessary adjustment of the uneven amounts due to them respectively.

(c) Upon the execution in favor of the District of the above transfers and assignments mentioned above in Section 2 hereof, and upon the deposit of said papers with the Depositary, the parties of the second part shall be entitled to receive \$220,000 par value in amount of the said bonds with the January 1st, 1912, and all subsequent coupons attached thereto, but the said \$220,000 par value in amount of bonds shall be held by the Depositary as security for the compliance by the parties of the second part with the terms of this contract and delivered to them as hereinafter set forth.

(d) The remaining \$280,000 in amount of the said bonds shall be delivered by the Depositary to the parties of the second part upon the payment of cash equal to the par value of the said bonds plus accrued interest thereon to the date of delivery.

Section 6. Said parties of the second part agree to use their best efforts to exchange the said outstanding bonds and notes of the Canal Company for the District bonds set aside therefor as aforesaid. The said parties of the second part further agree that they will purchase the \$280,000 in amount of the District bonds referred to in paragraph (d) of the preceding section, as follows, namely: \$50,000 within thirty days after the bonds are delivered to

the Depositary (with the opinion of Adams & Candee approving the same as hereinafter provided); \$50,000 within sixty days after such deposit, and \$50,000 within ninety days after such deposit, and the remaining \$130,000 on or before August 1st, 1912. In order to insure the performance of these obligations by the parties of the second part, the said \$220,000 of bonds of the District referred to in paragraph (c) of the preceding section of this agreement, are to be held by the Depositary as security and are to be delivered to the parties of the second part as the said outstanding bonds and notes of the Canyon Canal Company are surrendered to the Depositary and as the said bonds of the District which are to be purchased in cash by the parties of the second part are taken up by them, said Depositary is and shall be in writing authorized to deliver to the parties of the second part, or their order, bonds of the District (being bonds referred to in paragraph (c) of Section 5 hereof), equal to twenty-five per cent (25%) of the amount of the outstanding bonds and notes of the Canal Company so surrendered, the bonds of the District to be delivered by the Depositary to the said parties of the second part, or their order, as such bonds are surrendered from time to time, and as the District bonds referred to in paragraph (d) are taken up and paid for by the parties of the second part, the said Depositary is and shall be in writing authorized to deliver to the parties of the second part, additional bonds of the District (being bonds

referred to in paragraph (c), equal to twenty-five per cent (25%) of the par value of the bonds so taken up and paid for in cash by the parties of the second part; it being the intent hereof that the said Depositary shall retain in its hands as a guaranty and a security for the performance of the agreements in this section provided to be performed by the parties of the second part, bonds belonging to the parties of the second part and equal to twenty-five per cent (25%) of the said outstanding bonds and notes of the Canal Company remaining unsurrendered and of the bonds of the District remaining unpaid for by the parties of the second part, and that all the remainder of said \$220,000 of bonds shall be delivered to the parties of the second part on demand.

Section 7. It is further understood and agreed that the property of the Canal Company is subject to certain outstanding liens for labor, materials and work, said liens being described in detail in a list hereto attached and marked "List of Outstanding Contractors' and Laborers' Liens against the properties of the Canyon Canal Company." It is understood that the validity of some of the said liens is disputed by both of the parties hereto nothing herein contained shall be construed as an acknowledgment of the validity of the said liens nor as an agreement to pay the same nor any part thereof until the same shall have been fully adjudicated to constitute a valid and existing claim against the Canal Company and a valid and existing lien against its property, but in order that the title to the said

properties may be ultimately acquired by the District free from all such liens and in order that such properties may be owned by the District free and clear of all liens for the benefit of the District and of the holders of the said District bonds, the said Depositary shall be in writing directed to hold out of the proceeds of the said bonds which are to be paid for in cash by the parties of the second part, the sum of \$110,000, the said sum to be held as security for the payment of such outstanding liens as may be determined by the District or finally adjudged to be a valid claim and lien, and shall be authorized to pay to the holders of such liens in satisfaction thereof, such amounts as may be directed by the District and by the parties of the second part, and when all such liens shall have been paid in full or satisfied, the said Depositary shall pay over to the District any balance of said sum then remaining in its hands. The proceeds of said bonds in excess of the said sum of \$110,000 shall be paid by the Depositary to the District on demand.

Section 8. As hereinbefore stated, upon the exchange of any of the outstanding bonds and notes of the Canal Company, the coupons attached to the bonds of the District to be delivered in exchange therefor, shall be delivered in payment of the accrued interest on such outstanding bonds and notes of the Canal Company since July 1st, 1911. All accrued interest on said bonds and notes prior to that date (except the accrued interest on \$100,000 of second and collateral trust bonds, dated July 1st, 1906) shall be paid in cash by the parties of the second part;

such payment to be construed as an advancement to the District. Upon the release by the said The American Trust and Savings Bank of any of the cash now held by it as Trustee under any of the above mentioned trust deeds or trust agreements; out of such cash the parties of the second part are to be reimbursed for all such accrued interest so paid by them. If prior to the payment of such cash to the Depositary, the parties of the second part have heretofore paid any accrued interest on the bonds and notes theretofore surrendered, the amount of such payment shall thereupon be by the Depositary paid to the parties of the second part and the Depositary is and shall be in writing authorized thereafter to pay out of such cash, such accrued interest on the notes and bonds thereafter surrendered to it for exchange.

If the amount of all such cash eventually paid by The American Trust and Savings Bank to the said Depositary shall not equal the accrued interest on the said outstanding bonds and notes (except the second and collateral trust bonds of July 1st, 1906) and shall therefore be insufficient to pay the sums or fully reimburse the parties of the second part for such payment, then after the retirement of all such outstanding bonds and notes, the District agrees to pay to the parties of the second part all accrued interest paid by them in excess of the amount of such cash.

Section 9. The District is to furnish to the parties of the second part a complete certified record of all of the proceedings relative to the organization of the District and the authorization of the said bonds and

the confirmation of said proceedings by order of the court. Such proceedings are to be examined by Adams & Candee, attorneys of Chicago, Illinois, and the obligations of the parties of the second part under this contract are conditional upon the approval of the legality of said bonds by said Adams & Candee, and the giving of a written opinion approving the legality of the said bonds by the said Adams & Candee.

The District is to procure from each and every person owning land within the said District a waiver of errors; such waiver of errors shall be prepared by the said Adams & Candee and shall include a waiver of all errors in proceeds relative to the organization of the said District and the issuance of the said bonds and shall consent to the levy of a tax to pay the principal and interest upon said bonds in the manner provided and intended to be provided by the laws of the State of Idaho, regardless of the constitutionality of the act under which said proceedings were had and such levy made or any provisions of such act.

Section 10. In case the said parties of the second part shall fail to procure the exchange of all the said outstanding bonds and notes of the Canal Company prior to the time when the same shall be due, the parties of the second part shall take up and pay for in cash bonds of the District deposited under paragraph (a) of Section Five hereof, equal to the amount of such outstanding bonds and notes so becoming due and shall pay therefor in cash at par and accrued interest. If the said parties of the second part

shall fail to take up said bonds as above provided in order to furnish funds for the payment of the bonds of the Canal Company as the same become due (unless the same shall have been retired prior to such maturity), then in that event the District is hereby authorized to sell bonds of the District deposited with the Depositary referred to in paragraph (a) and (b) of Section Five hereof to the par amount of such bonds and notes of the Canal Company so becoming due, and in addition thereto the District is further authorized to sell such of the bonds mentioned in paragraph (c) of said Section 5 hereof, as may be necessary in order to provide funds to meet and pay the said bonds and notes of the Canal Company so becoming due, not exceeding, however, twenty-five per cent (25%) of the par amount of such bonds and notes so becoming due. It is, however, understood and agreed that the provisions of this section do not and shall not apply to the payment of any of the said outstanding bonds and notes on which there is now default in the payment of principal.

Section 11. The form of the bonds of the District hereinabove referred to shall be subject to the approval of the said Adams & Candee. The District is to pay all of the expenses of lithographing the said bonds and of preparing the certified copy of the records of the proceedings herein above in Section 9 referred to.

Section 12. The District covenants and agrees that all funds derived from the sale of its bonds above mentioned in excess of such funds as shall be

needed to retire the outstanding liens referred to in Section 7 hereof, shall be used and applied by it only in the improvement and extension of the said irrigation system.

Section 13. The above mentioned recitals, statements and agreements relative to the amount of mortgage contracts and cash now in the hands of the Continental and Commercial Trust and Savings Bank (formerly the American Trust and Savings Bank) are based on a statement made by the said bank on or about May 1st, 1911, such statement is accepted by both of the parties hereto as a true and correct statement and all risk of error or other incorrectness in said statement is assumed by the parties hereto each for itself or themselves; it being the understanding that no representation has been made by either of the parties hereto as to the truth or falsity of the said statement other than is contained in said statement itself.

Section 14. The said outstanding bonds and notes of the Canal Company which shall be surrendered by the said Depositary for exchange or otherwise, as above provided, are to be delivered by the Depositary to the Trustee under the respective mortgages and trust agreements securing the same, above mentioned for cancellation by said Trustee.

Section 15. The interest accruing on the bonds of the District deposited with the said Depositary and referred to in paragraph (a) and (b) of Section Five hereof, is to be paid by the District as the coupons attached to the said bonds become due. Such interest is to be used by the Depositary in pay-

ment of interest on the said outstanding bonds and notes of the Canal Company as the same becomes due, but not under any circumstances in payment of any interest on such bonds and notes which is now past due. All such interest on District bonds which shall be paid to the Depositary in excess of amounts paid out by it for the purpose of paying the interest on the notes and bonds of the Canal Company as aforesaid, shall be held and used by it in the payment of accrued interest on such bonds and notes when and as the same are finally surrendered or paid; it being the intent hereof, that all interest accruing on the outstanding bonds and notes of the Canal Company since July 1st, 1911, shall be taken care of and ultimately paid by means of the coupons attached to the District bonds and the interest coming due thereon.

IN WITNESS WHEREOF, the said EMMETT IRRIGATION DISTRICT has by authority of the Board of Directors caused this instrument to be signed by its President and attested by its Secretary, under its corporate name and seal and the said parties of the second part hereunto set their hand and seal the day and year first above written.

EMMETT IRRIGATION DISTRICT,

(Signed) By W. E. BELL,

(Seal)

President.

Attest: HARRY S. WORTHMAN,

Secretary.

J. J. CORKILL & CO. (Seal)

Endorsed. Filed Oct. 5, 1915.

A. L. Richardson, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 479.

STIPULATION ADMITTING ADDITIONAL
PARTIES

IT IS HEREBY STIPULATED AND AGREED:

(1) That A. N. Gaebler of St. Louis, Missouri, Helen M. Conrad of Ann Arbor, Michigan, S. H. Hudson of Benson, Minnesota, Henry M. Williams of Boston, Massachusetts, Charlotte H. Shipman of Hastings, Iowa, F. W. Horton of San Diego, California, Mary C. Waddell of Albany, New York, J. Willis Gardner of Quincy, Illinois, Chester County Trust Company (a corporation) of West Chester, Penn., Lincoln University (a corporation) of Oxford, Penn., and the National Bank of Oxford (a corporation) of Oxford, Penn., claiming to be holders of bonds issued by the defendant Emmett Irrigation District of the issue described in the bill of complaint herein, may be made parties plaintiff in said action with the same right and standing in said suit as if they had been co-plaintiffs therein from the commencement of such suit, and that the complaint herein may be amended accordingly and in such other respects as the said parties may be advised.

(2) That all depositions heretofore taken and all stipulations heretofore entered into and all orders and proceedings heretofore made or had in this cause, shall apply to the parties hereby admitted as plaintiffs in said suit as fully and to the same extent as if said parties had been plaintiffs herein since the commencement of this suit and had been specially named

or included in such stipulations, orders or proceedings.

(3) That the full title of said cause (after the name and title of the Court) shall be J. Paul Thompson, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and The National Bank of Oxford, a corporation, for themselves and all other bondholders of Emmett Irrigation District similarly situated, plaintiffs, versus Emmett Irrigation District, a municipal corporation, W. H. Shane, N. B. Barnes and E. J. Reynolds, as directors, and R. B. Shaw, as treasurer of said Emmett Irrigation District, defendants; but in all future pleadings and proceedings, such title may be abbreviated in accordance with the usual practice.

(4) That the allegations of the amended bill of complaint as to the purchase and ownership of said bonds by the new parties above named and as to the rights of such parties as holders of bonds of said Emmett Irrigation District shall be deemed denied, to the same extent and as fully as similar allegations of the original bill of complaint are denied in the answer heretofore filed by the said defendants, and the said defendants shall not be required to further answer the bill of complaint herein as amended, but the answer heretofore filed with the foregoing stipulation may stand as the answer of the defendants thereto; provided, that the said defendants may, within ten

(10) days after service of such amendment to the bill of complaint, file an amended or supplemental answer, answering any allegation in such amendment to which said defendants may be advised it is necessary for them to make further answer.

(5) That upon the filing of such amendment to the bill of complaint, this stipulation and such amended or supplemental answer, if any be filed by said defendants, the cause shall be deemed at issue, and the parties shall have the right to make further depositions and testimony in accordance with the provisions of the statutes of the United States and the Equity Rules.

Dated this 1st day of July, 1916.

RICHARDS & HAGA,
McKEEN F. MORROW,

Residence: Boise, Idaho.

Solicitors for J. Paul Thompson, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, Lincoln University, and the National Bank of Oxford.

WOOD, DRISCOLL & WOOD,

Residence: Boise, Idaho.

Solicitors for Defendants.

Endorsed. Filed July 7, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER MAKING A. N. GAEBLER, ET AL,
CO-PLAINTIFFS.

A. N. Gaebler and other holders (hereinafter named) of bonds of the Emmett Irrigation District, having presented their petition to be made co-plaintiffs, and it appearing that the plaintiff, J. Paul Thompson, brought said suit for himself and all other holders of bonds of said district who might desire to join in said cause and pay their proper proportion of the costs therein, and it further appearing that the defendants have stipulated and agreed in writing that said petitioners may be made parties plaintiff herein with the same right and standing in said suit as if they had been co-plaintiffs therein from the commencement of such suit, and that the complaint be amended accordingly, and in such other respects as the parties may be advised, and good cause appearing therefor,

It is ordered that the petitioners, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and National Bank of Oxford, a corporation, be and the said parties hereby are made co-plaintiffs, and each of them hereby is made a co-plaintiff in said suit with the same right and standing in said suit as if they had been named co-plaintiffs therein from the commencement thereof.

And, it is further ordered that the said parties so admitted as co-plaintiffs may file such amendment

or amendments to the complaint herein as they may be advised.

Dated July 7, 1916.

FRANK S. DIETRICH,
District Judge.

Endorsed. Filed July 7, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

AMENDMENTS TO BILL.

NOW COME the plaintiffs, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and National Bank of Oxford, a corporation, with the consent of J. Paul Thompson, the original plaintiff, and under leave of Court first had and obtained, and file the following amendments to the bill of complaint as amended, herein:

First: By inserting between Paragraph I and Paragraph II of said bill a paragraph to be numbered I-a, and reading as follows:

“That the plaintiff A. N. Gaebler is a citizen and resident of the State of Missouri, residing in the City of St. Louis, said State; that the plaintiff Helen M. Conrad is a citizen and resident of the State of Michigan, residing in the City of Ann Arbor, said State; that the plaintiff S. H. Hudson is a citizen and resident of the State of Minnesota, residing in the City

of Benson, said State; that the plaintiff Henry M. Williams is a citizen and resident of the State of Massachusetts, residing in the City of Boston, said State; that the plaintiff Charlotte H. Shipman is a citizen and resident of the State of Iowa, residing in the City of Hastings, said State; that the plaintiff F. W. Horton is a citizen and resident of the State of California, residing in the City of San Diego, said State; that the plaintiff Mary C. Waddell is a citizen and resident of the State of New York, residing in the City of Albany, said State; that the plaintiff J. Willis Gardner is a citizen and resident of the State of Illinois, residing in the City of Quincy, said State; that the plaintiff Chester County Trust Company is a corporation organized under the laws of Pennsylvania and a citizen of said State, with its principal office in the Town of West Chester, State of Pennsylvania; that the plaintiff Lincoln University is a corporation organized under the laws of the State of Pennsylvania and a citizen of said State, with its principal office in the Town of Oxford, said State; and that the plaintiff National Bank of Oxford is a corporation organized under the National Bank laws of the United States, with its office and principal place of business in the Town of Oxford, said State, and is a citizen of the State of Pennsylvania.”

Second: By inserting between Paragraphs XI and XII of the original bill herein, a paragraph to be numbered XI-a, and reading as follows:

“That relying upon the facts set forth in Paragraph XI of the bill as to the issuance of said bonds by said Emmett Irrigation District and the legality

thereof, and having been advised that the said District had been legally organized and that said bonds had been legally authorized and were the valid and binding obligations of said District, and relying also upon the recitals contained in said bonds that the same had been issued in compliance with the laws of the State of Idaho and that all things required to make the same the legal, valid and binding obligations of said District had been done and had happened and been performed, and that all real property included in said District was subject to the levy of an annual tax for the payment thereof, and without knowledge or notice of any fact whatsoever impairing the validity of said bonds, or any of them, these plaintiffs purchased prior to January 1st, 1914, for a valuable consideration the bonds of said District issued as aforesaid and as set forth in said Paragraph XI, to the amount and of the denominations and numbers as hereinafter set forth, and these plaintiffs now are and ever since have been the owners and holders respectfully of said bonds, to-wit:

(a) That the said A. N. Gaebler purchased and is the owner of said bonds to the amount of \$47,500.00, par value, being bonds numbered D-298, D-345 to D-353, inclusive, D-383 to D-387, inclusive, D-493 to D-497, inclusive, D-598, D-637 to D-643, inclusive, D-789 to D-800, inclusive, D-850 to D-855, inclusive, D-987 to D-998, inclusive, D-1033 to D-1044, inclusive, D-1055 to D-1058, inclusive, D-1300 to D-1304, inclusive, D-1383 to D-1396, inclusive, D-1399 to D-1400, inclusive, being ninety-five bonds, each of the denomination of \$500.00;

(b) The said Helen M. Conrad purchased and is the owner of said bonds to the amount of \$2,000.00, par value, being bonds numbered D-90, D-91, D-144 and D-145, each of the denomination of \$500.00;

(c) The said H. S. Hudson purchased and is the owner of said bonds to the amount of \$4,000.00, par value, being bonds numbered M-124 and M-125, each of the denomination of \$1,000.00, and bonds numbered D-779, D-849, D-1031 and D-1492, each of the denomination of \$500.00;

(d) The said Henry M. Williams purchased and is the owner of bonds to the amount of \$1,000.00, being bond numbered M——;

(e) The said Charlotte H. Shipman purchased and is the owner of said bonds to the amount of \$1,000.00, being bond numbered M——;

(f) The said F. W. Horton purchased and is the owner of said bonds to the amount of \$5,000.00, par value, being bonds numbered M-138 to M-142, inclusive, each of the denomination of \$1,000.00;

(g) The said Mary C. Waddell purchased and is the owner of said bonds to the amount of \$1,000.00, par value, being bond numbered M-228;

(h) The said J. Willis Gardner purchased and is the owner of said bonds to the amount of \$7,000.00, par value, being bonds numbered M-88, M-89 and M-112, each of the denomination of \$1,000.00, and bonds numbered D-547 to D-550, inclusive, and D-691 to D-694, inclusive, each of the denomination of \$500.00;

(i) The said Custer County Trust Company purchased and is the owner of said bonds to the amount

of \$10,000.00, being bonds numbered D-569 to D-578, inclusive, and D-717 to D-726, inclusive, each of the denomination of \$500.00;

(j) The said Lincoln University purchased and is the owner of said bonds to the amount of \$5,000.00, par value, being bonds numbered D-583 to D-592, inclusive, each of the denomination of \$500.00;

(k) The said National Bank of Oxford purchased and is the owner of said bonds to the amount of \$10,000.00, par value, being bonds numbered D-559 to D-568, inclusive, and D-707 to D-716, inclusive, each of the denomination of \$500.00.

That the interest accruing on said bonds as evidenced by interest coupons thereto attached as aforesaid, maturing January 1st and July 1st of each year to and including the year 1913 has been paid but no interest has been paid thereon since the 1st day of July, 1913, and the interest coupons attached to said bonds and maturing January 1st, 1914, July 1st, 1914, January 1st, 1915, July 1st, 1915, January 1st, 1916, and July 1st, 1916, have not been paid, and the said defendants have failed, neglected and declined to pay the same or any thereof, and have levied no tax since the month of October, 1913, for the payment of interest on any of said bonds, and have failed, neglected and declined to carry out any of the obligations by them to be kept and performed, except as alleged in said original bill, relative to the levy and collection of taxes for the payment of interest on said bonds or for the benefit or protection of the holders thereof."

Third: These plaintiffs hereby adopt the following paragraphs of the original bill as amended, and pray that they may have the same benefit thereof as if said paragraphs were herein set forth at large with the necessary changes of the singular to the plural, to-wit: Paragraphs I to X, inclusive, Paragraph XII, Paragraph XIV, Paragraph XV except the allegation that the interest coupons were presented to the Treasurer of the District on the 9th day of January, 1914; the demand on the Treasurer by these plaintiffs for the payment of the interest coupons owned by these plaintiffs having been made at various times prior to the 1st day of July, 1916, and Paragraph XVI (as amended) to Paragraph XIX, inclusive; and these plaintiffs pray that they may each have the relief prayed for in the original bill.

A. N. GAEBLER,
HELEN M. CONRAD,
S. H. HUDSON,
HENRY M. WILLIAMS,
CHARLOTTE H. SHIPMAN,
F. W. HORTON,
MARY C. WADDELL,
J. WILLIS GARDNER,
CHESTER COUNTY TRUST COMPANY,
LINCOLN UNIVERSITY,
NATIONAL BANK OF OXFORD,

By RICHARDS & HAGA,
McKEEN F. MORROW,

Their Solicitors.

OLIVER O. HAGA,
Of Counsel.

United States of America,
District of Idaho,
County of Ada.—ss.

Oliver O. Haga, being first duly sworn, deposes and says: That he is one of the solicitors for the plaintiffs above named; that he has read the foregoing amendment to the bill of complaint and knows the contents thereof, and believes the same to be true; that he makes this affidavit and verification for and on behalf of the said plaintiffs for the reason that said plaintiffs are, and each of them is, absent from said District; and this deponent further says that he has obtained his information relative to the matters set forth in said amendments from official records, letters and other communications received concerning such matters, and from sources which he believes to be reliable.

OLIVER O. HAGA.

Subscribed and sworn to before me, this 7th day of July, 1916.

EDNA L. HICE,

(Seal)

Notary Public.

Service of the foregoing amendments and receipt of copy thereof, admitted this 7th day of July, 1916.

WOOD, DRISCOLL & WOOD,

Solicitors for Defendants.

Endorsed: Filed July 7, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

STIPULATION.

It is hereby stipulated and agreed by and between Richards & Haga, solicitors for the plaintiffs above named, and Rice, Thompson & Buckner, and Wood, Driscoll & Wood, solicitors for the defendants in said action, and each of them:

I.

That the first paragraph of said plaintiffs' amendments to the bill in the above entitled cause, filed July 7, 1916, being paragraph I-a of said bill as amended, the allegations contained in the second paragraph of the said amendments to said bill, being paragraph XI-a of said bill as amended, are each and all deemed denied to the same extent and effect as had defendant filed amended answer specifically denying each and all the allegations therein contained.

II.

That paragraph seven of the original answer in said action shall be amended as follows, to-wit:

(a) By inserting the words "or coupons", after the word "bonds" in line three thereof, and by adding to said paragraph seven of said answer the following: "deny that said, or any, bonds were thereupon, or at any other time or at all, issued and sold, or issued or sold by the said District in the manner in such cases, or any case, made or provided by the laws of the State, or otherwise, or at all, except as hereinafter set forth; deny that the proceeds of

said, or any, bonds were received and used by said District in the purchase of irrigation works, water rights and property, or irrigation works, or water rights, or property, required or deemed necessary by, the board of directors of said District for carrying out the plans formulated by said board, as alleged in paragraph X of said complaint, for the purpose of furnishing water for irrigating the lands, or any land, situated within the boundaries of said District, or otherwise, or at all, save and except as hereinafter set forth, and denies that said District received any proceeds from said or any bonds, except as hereinafter set forth."

III.

That paragraph eight of said answer be amended by adding after the word "sum" in line 9 on page 4 of said answer, the words, "or at all".

IV.

By striking out the first five lines and the word "connection" in line six of paragraph 11, on page 18 of said answer.

V.

That said answer, as amended, including not only the denials therein but all of the affirmative matter therein contained, and each and all the separate defenses therein set forth, shall stand as the answer of each and all the defendants to the said complaint as amended, and as the answer to each and all the parties plaintiff, including the parties plaintiff added by amendment, each and all of the defenses therein pleaded as to the original plaintiff, J. Paul Thomp-

son, and all the issues presented as to said original plaintiff, to be deemed pleaded as to each and all of said plaintiffs, the necessary changes from singular to plural and as to names, numbers and amounts to be deemed made.

It being the intention of this stipulation to waive filing of amended answer to said complaint as amended and to present the same issues to each and all said plaintiffs brought in by amendment of said complaint as are raised as to said J. Paul Thompson the original plaintiff, by the original answer on file herein, as herein amended.

RICHARDS & HAGA,

Residence, Boise, Idaho,

Solicitors for Plaintiffs.

RICE, THOMPSON & BUCKNER,

Residence, Caldwell, Idaho, and

WOOD, DRISCOLL & WOOD,

Residence, Boise, Idaho,

Solicitors for Defendants.

Endorsed: Filed Aug. 17, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

INTERROGATORIES FOR DISCOVERY BY
PLAINTIFF OF FACTS AND DOCUMENTS
MATERIAL TO DEFENSE.

Comes now each and all the defendants above named, each and all of whom have heretofore filed a joint answer in the above entitled cause, by J. M.

Thompson, Fremont Wood and Dean Driscoll, their Solicitors of record, and propound the interrogatories hereinafter set forth for discovery by the above named plaintiffs, J. Paul Thompson, A. E. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte M. Shipman, F. W. Horton, Mary C. Waddell, and J. Willis Gardner of facts and documents necessary to the defense of said cause, pursuant to Rule 58 of the Rules of Practice of the Courts of Equity of the United States.

INTERROGATORY No. 1.

From whom did you purchase the bonds of which you are alleged to be the owner in the amended bill of complaint herein, and when did you purchase them?

INTERROGATORY No. 2.

What consideration did you pay for said bonds and in what way did you pay for them, in cash or the exchange of other property?

INTERROGATORY No. 3.

If the bonds referred to in the above interrogatories were purchased by you upon different occasions, give the date of each purchase and the amount paid and method of payment for each said purchase.

INTERROGATORY No. 4.

If you have already answered that you exchanged other property for these, or any of these bonds, describe the property thus exchanged, the amount and number of the bonds for which such property was exchanged.

INTERROGATORY No. 5.

State whether or not you were the owner of any of the bonds or notes of the Canyon Canal Company.

INTERROGATORY No. 6.

If your answer to the last interrogatory is in the affirmative, you may state whether or not you exchanged such bonds or notes for the bonds of the defendant, Emmett Irrigation District.

INTERROGATORY No. 7.

If you have answered that you exchanged bonds or notes of the Canyon Canal Company for the bonds of the Emmett Irrigation District, you may give the numbers and denominations of the bonds of the defendant Emmett Irrigation District which you took in exchange, and you may state in the same connection by what means such exchange was effected.

INTERROGATORY No. 8.

If you have answered that you exchanged bonds and notes, or bonds or notes, of the Canyon Canal Company, through the Fort Dearborn Trust & Savings Bank of Chicago, Illinois, you may state whether or not the bonds involved in this action and of which you are alleged to be the owner in the amended complaint are the bonds for which said exchange was made.

INTERROGATORY No. 9.

If you have stated that you made such exchange through the Fort Dearborn Trust & Savings Bank, state whether or not you have in your possession any document, or the copy of any document, involved in the making of such exchange, and if you have

such document or writing, will you please produce the same and have the same attached hereto as a part of your answer to this interrogatory.

INTERROGATORY No. 10.

State whether or not you had any business dealings with J. J. Corkill or with J. J. Corkill & Co. in any way involving your purchase or procurement of the bonds now owned and claimed by you, and if you had any dealings, please state in detail what those dealings were; to what extent, if any, said Corkill or Corkill & Co. represented you in the transaction, and you may also state what if any information you had as to said Corkill or Corkill & Co., representing the defendant Emmett Irrigation District in the matter, either of the sale or exchange of the bonds of the said Emmett Irrigation District.

INTERROGATORY No. 11.

Please state when you first saw the bonds which you purchased.

Defendants require that each and all of the afore-said interrogatories be answered by each of the said plaintiffs, to-wit: J. Paul Thompson, A. E. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte M. Shipman, F. W. Horton, Mary C. Waddell, and J. Willis Gardner.

Respectfully submitted,

J. M. THOMPSON,

Residing at Caldwell, Idaho.

FREMONT WOOD,

and DEAN DRISCOLL,

Residing at Boise, Idaho,

Attorneys for Defendants.

Service of the within and foregoing interrogatories, by receipt of nine copies thereof this 17th day of August, 1916, is hereby acknowledged, and the making of an order by the Court or Judge permitting the filing of said interrogatories and for an examination of the plaintiffs named in said interrogatories, is hereby waived, plaintiffs however reserving the right to file objections to said interrogatories or any of them pursuant to Rule 58 of the Rules of Practice for Courts of Equity.

RICHARDS & HAGA,
Residing at Boise, Idaho,
Attorneys for Plaintiffs.

Endorsed: Filed Aug. 17, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

DECISION.

May 31, 1917.

*Richards & Haga, and McKeen Morrow, Attorneys
for Plaintiffs.*

Wood & Driscoll, Attorneys for Defendants.

DIETRICH, DISTRICT JUDGE:

This is a suit brought by bondholders against an irrigation district organized under the general laws of Idaho, and its directors, for the purpose principally of having a judicial determination of the validity of its outstanding bonds. It was commenced by J. Paul Thompson, who claims to be the holder of

bonds of the par value of \$101,000.00, upon his own behalf and upon behalf of all other holders of bonds who might come in and share in the expense of the litigation. Several other bondholders intervened before trial and made proof touching their holdings. No evidence was offered relative to Thompson's bonds, and at the close of the hearing his counsel moved for a dismissal as to him, but without prejudice.

The bonds directly in suit are a part of an authorized issue of \$1,100,000.00 par value, of which \$897,600.00 are outstanding. The district has defaulted in the payment of the accrued interest, and through its officers has given out that it will presently honor none of the bonds because at least a considerable number of them are invalid.

It seems that upon proceedings duly taken as provided by law, the organization of the defendant district was confirmed, and the steps taken to authorize the issuance of the bonds in question were approved, by decree of court entered January 23, 1911. At that time there existed within the boundaries of the district an irrigation system, which had been constructed or partially constructed by the Canyon Canal Company under the provisions of the Carey Act, and water rights therein had been sold or contracted to many of the land owners. This system had been transferred to the Emmett Bench Canal Company, the holding company under the Carey Act, and thereafter, to-wit, on August 15, 1911, this company for a nominal consideration conveyed the system to

the district. At the time of the conveyance the property was subject not only to the burden of the outstanding water contracts with the farmers, which were liens upon their lands for deferred payments, but of certain trust deeds, and possibly other claims. While in neither deed referred to did the grantee assume the personal obligation of discharging these liens and claims, the conveyances were accepted subject to all legal charges, liens, and claims upon and against the property, and the canal company reserved the right to collect the deferred payments upon all of the outstanding water contracts. Such being the conditions, upon September 12, 1911, the district entered into a contract with J. J. Corkill & Company, of Chicago, Illinois, which, after reciting that the district was desirous of purchasing the irrigating system (to which, as we have seen, it already had title), and that Corkill was able to sell and deliver it, and further reciting that there were outstanding bonds and notes of the Canyon Canal Company aggregating \$570,000.00, besides interest, secured by mortgages and water contracts, and that it was the desire of the district to pay all these obligations and to lift all incumbrances upon and claims against the irrigation system, and to procure funds for the extension and improvement thereof, and reciting further that Corkill & Company were able to give valuable assistance in making an exchange of the district bonds for such outstanding obligations, and were willing to purchase the bonds not required for that purpose, it was agreed that Corkill & Com-

pany would use their best efforts to consummate the desired exchange, and would cause to be transferred to the district the entire irrigation system, and would further cause to be assigned to it an unsecured claim of the Trowbridge & Niver Company against the Canyon Canal Company, the precise nature of which is not explained. The Fort Dearborn Trust & Savings Bank of Chicago was agreed upon as a depository, and with it the district was to deposit the entire issue of its bonds, for delivery from time to time as they were exchanged or sold by Corkill & Company. When the obligations of the Canal Company were finally discharged by exchange or payment, the water contracts which the Canal Company had deposited as collateral with the trustee of its bonds and notes were to be turned over to the district. These aggregated \$525,469.62 principal, and \$76,868.16 interest, and there was also in the hands of the trustee cash to the amount of \$28,197.94, making a total of principal, interest, and cash of \$630,535.72,—all of which was to go to the district as soon as the canal company's obligations were discharged in the manner hereinafter recited. The \$1,100,000.00 bonds were to bear date January 1, 1911, and the coupons maturing July 1, 1911, were to be detached before delivery to the depository. The depository was to hold the bonds and deliver them in the following manner, namely: \$470,000.00 to Corkill & Company, or upon their order, in even exchange for \$470,000.00 of the bonds and notes of the Canyon Canal Company, and Corkill & Company

were to pay to the holders of such outstanding bonds and notes any excess of accrued interest thereon, for which they were to be reimbursed out of the \$28,-197.94 cash in the trustee's hands, and \$130,000.00 on account of the other \$100,000.00 of bonds and notes and the accrued interest thereon, aggregating, principal and interest, \$130,000.00. Two hundred and eighty thousand dollars of bonds were to be delivered upon payment to the credit of the district of cash equal to the par value thereof and accrued interest. The consideration for the other \$220,000.00 bonds is not so clear. It was provided that they were to become the property of Corkill & Company when the latter caused to be delivered to the depository proper instruments transferring to the district the irrigation system and the unsecured claims of Trowbridge & Niver Company, but they were to be held by the depository as security for the performance by Corkill & Company of their obligations under the contract, among which was the obligation to purchase the \$280,000.00 bonds in cash at par. These \$280,000.00 bonds they were to take in installments, \$50,000.00 in thirty days, \$50,000.00 in sixty days, \$50,000.00 in ninety days, and \$130,000.00 on or before August 1, 1912. Provision was made for the delivery by the depository to Corkill & Company of the \$220,000.00 bonds, the details of which need not be stated, for in general the depository was at all times to retain of such bonds an amount equal to twenty-five per cent of the then outstanding unexchanged obligations of the Canal Company, plus

the amount of \$280,000.00 bonds which Corkill & Company had not taken and paid for in cash.

The district further agreed to get from all land owners a written waiver of all errors and irregularities of procedure, together with consent that their lands be taxed to pay the interest and principal of the bonds.

Corkill & Company failed to purchase the whole of the \$280,000.00 bonds within the time agreed upon, and on September 12, 1912, a supplemental agreement was executed, which after reciting such default, provided for an extension of time to complete such purchase. It was also agreed that \$5,000.00 of the \$220,000.00 bonds, and \$20,000.00 of the \$280,000.00 bonds, should, by the depository, be returned to the district.

There was still another contract between the parties with a view to effecting the disposition of the bonds for cash, but it is unimportant at the present juncture, for generally it may be said that such bonds as are outstanding were disposed of under the contractual arrangement and for the considerations already explained. Of the bonds now out approximately \$599,000.00 were exchanged in retiring the obligations of the Canyon Canal Company, as was contemplated by the agreement. Of the balance, \$125,000.00 were sold for cash, \$175,000.00 were delivered to Corkill & Company on account of the \$220,000.00, and \$25,000.00 were, by agreement of the parties, returned to the district. The depository still has in its possession approximately \$177,-

000.00. The contract was complied with in every respect except that Corkill & Company did not purchase for cash more than half of the stipulated amount of bonds, but admittedly this default does not affect the validity of the bonds which are actually outstanding, all of which were issued in compliance with the contract. It is further to be borne in mind that the issuance by the district of the bonds to the amount of \$1,100,000.00 was duly authorized, and the district was not induced by any fraudulent practices on the part of Corkill & Company to enter into the contract. The defenses are therefore limited to claims that the bonds are irregular in their form and in the manner of their execution, and that many of them, as appears from the contract and the explanatory testimony, were disposed of for an illegal consideration.

I am not inclined to regard seriously the irregularities relied upon in the form of the bonds and in the manner of their issuance. With a possible exception, depending upon the construction to be placed upon ambiguous or inconsistent recitals, the time fixed for their maturity is thought to be in harmony with the intent of the law. The Idaho statute is different from that of California, which is relied upon by the defendants to sustain their contention. The Idaho statutes contemplate that all of the bonds of a single issue shall be dated as of the first of January or the first of July, and their maturities are to be computed from the date of such "issue," regardless of the precise time any particular bond may be actually sold and delivered (Idaho Revised Codes, Sec. 2397):

The word issue, with its derivatives, does not always have the same meaning, and the intent with which it is employed must often be determined in the light of other parts of the provision where it is found, and taking the Idaho statute as a whole, I think the foregoing construction the more reasonable. A discussion of the corresponding, but dissimilar, California statute may be found in *Wright v. East Side Irrigation District*, 138 Fed. 313. See also *Yesler v. City of Seattle*, 25 Pac. 1014.

That the bonds were not executed by persons who were in office at the time they were deposited with the depository and by it delivered to Corkill & Company, or upon their order, is immaterial. They were executed by persons in office at the time their signatures were attached, and such acts constituted execution by the district. It remained only to deliver the bonds after sale, and the delivery likewise was made by persons in office at the time of the delivery, and such execution and delivery were therefore the acts of the district. I am wholly unable to appreciate the reasoning by which it is concluded that both the signature and delivery must be made by the same individuals. A corporation acts through its officers, and it is as much bound by a continuity of action of several successive persons in office as by like action initiated and consummated by a single person in office. *O'Neill vs. Yellowstone Irrigation District*, 121 Pac. 283. I note that in defendant's brief it is stated that some of the bonds were signed by Bell after he had ceased to be president of the district. Such is

not my recollection of the testimony, but even were this view to be adopted the bonds so signed are not identified; furthermore they were treated and disposed of as the duly executed bonds of the district by the authorized officers thereof, and were put upon the market for sale, and were sold. Under such circumstances the defendants cannot be heard to question the regularity of their execution. As to the ambiguous or inconsistent recitals touching maturity, I think that in view of the fact that the bonds have been sold the doubtful language should be resolved in favor of their validity—especially inasmuch as the alleged irregularity cannot substantially prejudice the rights of the district. The further objection that the bonds were not properly registered by the officers of the district is thought to be without merit. The statutory requirements relied upon are directory, and are not conditions precedent to the right of the district officers to issue the bonds; the failure of such officers to do their duty is without prejudice to the purchasers.

Passing now to the question of the legality of the consideration. It is of course not a question of the sufficiency of the consideration. If the directors acted within the scope of their authority we cannot relieve the district from the consequences of a bargain which may have turned out to be bad. The question is whether the contract was in excess or the district's powers, whether it was *ultra vires*. Under this head no point is made touching the bonds sold for cash (Idaho Revised Codes, Sec. 2404). It is further

conceded that had the \$600,000.00 of bonds which were applied to the discharge of the mortgage and other liens against the property been used to acquire title to the irrigation works, such disposition would have been within the law (Idaho Revised Codes, Sec. 2386). Why the parties drew the contract in such form as to make it appear to cover the purchase and transfer of the physical properties is not made to appear, but of course Corkill & Company cannot be said thus to have deceived or misled the district. That feature raises no question of fraud. Everyone doubtless knew the facts. The district not only held the title to, but was in the actual possession and control of, the system, when the contract was made. We may conjecture that having some doubt as to whether under the statute the bonds could be disposed of in exchange for outstanding obligations in the nature of liens against the property, the parties, for the purpose of making a record entirely regular upon its face, resorted to this reprehensible expedient of falsely reciting that the district desired to purchase the canal system. But ignoring this untrue recital, and taking the facts as they actually existed, was the consideration for which the bonds were disposed of illegal or in excess of the authority of the directors to accept? Section 2386 of the Revised Codes of Idaho, after in general terms authorizing the board of directors to provide an adequate irrigation system, either by construction or by purchase, adds that "in case of purchase the bonds of the district * * may be used to their par value in pay-

ment." While it is true that, as we have seen, the district had acquired the legal title to the system, in no real sense was it the owner thereof. The nominal consideration of \$10.00 recited in the deed may very well have been a fair measure of the real value of the interest conveyed. With water contracts out absorbing a large part, if not the whole, of its capacity, the system was as likely to be a liability as an asset to the holder. It must not be forgotten that these contracts were held by the Canyon Canal Company with the reservation to it of the right to collect all deferred payments thereon. If, therefore, the district was in reality to become the owner of this irrigation system in the sense, and the only sense, in which the statutes plainly contemplate such a system shall be owned by a district, it was indispensable that the beneficial as well as the nominal ownership be acquired. Contracts which would absorb the whole utility of the enterprise, and liens which, if not discharged, would ultimately result in divesting the district of even its naked legal title, must be taken over or wiped out before the district could be said to be the real owner. Suppose that instead of two transactions the acquisition of the legal title and the assignment of the water contracts and the liquidation of the liens had all been accomplished at one time, could there be any doubt that such a consummation would have simply amounted to a "purchase" of the irrigation system, and nothing more? But the circumstances that the result was reached by two steps instead of one does not change the essen-

tial nature of the transaction. I entertain no doubt that under the statutory provision quoted it was competent for the directors to use the bonds at their par value for the purpose of relieving the system from charges that rendered it well nigh valueless to the district.

It is further said that some of the notes and bonds for which the bonds were exchanged did not constitute valid liens. No very clear statement of just what facts are supposed to support this contention appears in the record. But however that may be, there is no proof of fraud or deceit upon the part of anyone concerned, and no charge of collusion between the directors of the district and Corkill & Company, and I am therefore of the opinion that questions touching the validity of the bonds and notes of the canal company, or of the water contracts, or of the agreements by which the mortgage and other liens were created, cannot now be raised. Assuming, as we must that the directors acted in good faith, their conclusion is now binding upon the district. They may have made a mistake, they may have been ill-advised, but we cannot now inquire into or revise their judgment. It would be quite as reasonable to question the validity of bonds admittedly given as the purchase price of an irrigation system, upon the ground that the price agreed upon by the directors in good faith was in fact excessive. Undoubtedly there were outstanding bonds, notes, and contracts which were claimed to be charges upon the property. The district officers could at their option

have questioned them at the time the contract was entered into and declined to include any particular bonds or claims, but manifestly they either recognized their validity, or deemed their invalidity so doubtful that they were unwilling to assume the burden of a contest. The district has now had all of these liens and charges cleaned up and has gotten the consideration for which the bonds were issued, and it cannot be heard to say that some of the claims might have been defeated if a contest had been instituted. In good conscience it would have to restore the consideration and put the parties in *statu quo*, and that it does not offer to do, and probably could not do. The transaction in this respect being within the scope of the directors' authority, their action is at this late date conclusive, in the absence of fraud, and no fraud is charged.

We come now to consider the status of the outstanding bonds of the \$220,000.00 group, approximately \$175,000.00. Admittedly the power of the irrigation district to dispose of its bonds is limited to either a sale for cash or an exchange at face value for irrigation works. Under the contract no money was to be paid for these bonds. The district held the legal title to the physical property constituting the irrigation system, and the bonds we have already discussed were to fully satisfy all liens against or upon it. For what consideration, then, were Corkill & Company to receive \$220,000.00? The defendants say, commission or compensation for their services. The contract is vague and throws no clear

light upon the question. It recites that the district had authorized the sale of \$1,100,000.00 bonds, and that it desired to use them "for the purpose of purchasing the properties of the said canal company, retiring all of the (said) outstanding bonds and notes of the canal company, paying all valid and outstanding liens, charges, and claims against the property, so that said property may be held by the district free and clear of all liens whatsoever, and to furnish funds" for the extension and completion of the system; and it is further recited that Corkill & Company are "able and willing to assist the district in exchanging the bonds of the district for said outstanding notes and bonds of the canal company, and also are willing to purchase the remainder of said bonds over and above those that are necessary to be used in effecting such exchange." There is no express provision for a discount or a commission or other compensation to Corkill & Company, and the mode provided for the delivery to them of the \$220,000.00 bonds is doubtless suggestive of a commission upon the bonds exchanged and a discount on the bonds purchased—a straight twenty per cent upon the entire issue. We find a vague reference to some sort of claim against the canal company held by Trowbridge & Niver Company, for the payment of which no express provision is made, and which possibly in the minds of the parties might have constituted a consideration in whole or in part for these bonds. Without any explanatory recital either preceding or attending it, there is a clause following

the agreement of Corkill & Company to transfer to the district the entire irrigation system of the canal company, to the effect that they would also assign or cause to be assigned "the unsecured claim or claims against the canal company held by Trowbridge & Niver." There is no further explanation of such claim or claims, no light upon the amount, origin or nature thereof, but it does appear that whatever the claim or claims may have been, they were "unsecured," and hence constituted no lien upon or charge against the canal system, and were therefore beyond the power of the district or its officers to pay.

But while doubtless the defendants' theory of a twenty per cent commission—which would be unlawful is not without strong support, another view quite as reasonable I think can be taken, by which the contract may be sustained rather than overthrown. Unfortunately there is no recital of what, at that time, the parties estimated the canal properties to be worth, and the record is without direct light. There is in evidence a financial statement of the district as of date February 1, 1913, formerly certified as being correct by the president and the secretary of the district, which perhaps may be accepted as fairly disclosing the views which were then entertained. From this it would appear that the physical properties—the dam, canals, headgates, etc.—were estimated to be worth in the aggregate \$952,000.00, and the horses, tools, and other equipment, \$30,000.00. In addition to this, a value of \$876,-

000.00 is placed upon a decreed water right of approximately 440 second feet. Even though we may be inclined to regard this last item as in a very large measure visionary and fictitious, still such right may in itself have been of some substantial value. However that may be, the estimate does tend to disclose the probable views and estimates of the officers of the district at that time, and inferentially at the time the contract was executed. Now it is fair to assume I think that when it was organized the district had no assets, and that its only funds came from the sale of its bonds and direct assessments against the lands. What amount of money it had realized from assessments for the year 1912 does not appear, but the statement referred to shows that \$60,000.00 on account thereof had not been collected, and hence it was probable that little from this source had gone into permanent additions to the irrigation system. If we assume that the whole of the \$125,000.00 realized from the cash sales of bonds had been devoted to betterments, and that the system had received a corresponding increment of value since its purchase, and if we put aside all consideration of the value of the mere water right, it may be reasoned that the property in the condition in which it was in September, 1911, was considered to be worth approximately \$850,000.00. Now if the contract had been fully carried out and all the bonds disposed of, the district would thus have had the physical property free from liens and incumbrances, and \$180,000.00 in money, realized from the cash sales of bonds which Corkill

& Company failed to take, and its outstanding obligations would be \$1,100,000.00. The consideration which it would thus have received for its bonds would be a little less than the face value of the bonds. Or, if we put it in another way and take the transaction as it actually stands, the district acquired property which is worth \$857,000.00, besides the water right, and on account thereof has issued and has outstanding bonds to the amount of approximately \$900,000.00. Now reverting to the contract, we have seen that at the time of the execution thereof, while the canal company had parted with the legal title to the system, it had, prior to such conveyance, contracted to farmers water rights which absorbed a large part of the beneficial interest therein, and it held these contracts, which aggregated, principal, interest, and cash on hand with the trustee, \$630,535.72. While it is true that it did not have possession of the contracts or the cash, but they were held by the trustee as collateral, still manifestly upon completing the exchange of the \$600,000.00 district bonds for the outstanding bonds and notes of the canal company, in the absence of some agreement to the contrary, the canal company would at once become entitled to the possession of both this cash and the contracts, and, under the reservation of its deed to the operating company, it had the right to continue to collect the deferred payments and to devote the whole thereof to its own use. Upon the other hand, the land holders, upon completing such payments, would be entitled to receive water from

the canal, and indeed would become the several owners of undivided interest in the system. Just what portion of the capacity of the canal these rights would, in the aggregate, represent is not made certain, but a very substantial part, it must be assumed, and such rights, it hardly need be said, would have to be respected by the district, which acquired only what the canal company had to sell to its or its immediate grantor. If, therefore, the district was to purchase the system in its entirety, and to acquire the absolute title thereto and the complete beneficial interest therein, free from liens or other burdens, it would be necessary to wipe out these contracts. Just how this was to be done does not appear, but it is expressed in the agreement (Section 3) that Corkill & Company were to cause all of these contracts to be assigned to the district as soon as the \$600,000.00 bond exchange was consummated. If, therefore, we assume that the \$220,000.00 bonds were in consideration for the assignment of these contracts, it follows, I think, that within the meaning I have placed upon the statute authorizing the use of bonds in the payment of the purchase price for irrigation works, these bonds were not issued for an unauthorized consideration. While the real intent of the parties is not certain, it is clear that the district was to get this large volume of contracts, of great value in any view, for which it was to pay no designated or express consideration. If it should be successful, as in all probability it would be, in procuring their cancellation by the landowners in the district, and

inducing the parties thereto to come in and take water upon the same basis with other land owners, it would in effect have acquired a large interest in the irrigation system. The contract leaves no doubt that such was the purpose. But even if unsuccessful in carrying out this purpose, it would still have the right to collect deferred payments aggregating nearly three times the amount of the \$220,000.00 bonds, and therefore in assigning these contracts to the district there was in effect a transfer of a large aggregate interest in the irrigation works called for by the contract. It being quite as reasonable to assume that such was the consideration for the \$220,000.00 bonds as that they were intended to cover a commission or rebate, it is our duty, under a familiar principle, to adopt the view that the parties intended a legal rather than an illegal transaction.

It may be added that even were it reasonably clear that the \$220,000.00 bonds were intended as a commission, it would be extremely difficult, if not impossible, now to give relief. It is highly improbable that at this late date such bonds could be identified, or would be found in such a condition that the defense of illegal consideration would be available. It is altogether likely that practically all the land owners in the district knew of the contract and by their silence and inaction they have acquiesced therein. If the directors were exceeding their authority and attempting to do an illegal thing, prompt action should have been taken to restrain them. The district has gotten from the contract a benefit which it

cannot now restore, and rights of the innocent public have grown up, which would be imperilled by any attempt on the part of the court to reach and cancel these bonds. Even though we might not be inclined to recognize the doctrine of estoppel in the extreme reach to which it seems to have been carried by the Supreme Court of the State in *Page v. Oneida Irrigation District*, 26 Idaho, 108, 141 Pac. 238, we should at least not be astute to find a reason for overthrowing a contract with which apparently all parties affected thereby were content, until after it had in a large measure been performed.

Having reached this conclusion, it is unnecessary to discuss the question whether the intervening plaintiffs who submitted proof touching the manner of their acquisition of the bonds which they hold and the consideration they paid for them are innocent purchasers for value. Nor is it thought to be necessary to consider what action it would be appropriate to take had it been found that a part of the bonds were illegally issued.

A decree will be entered establishing the validity of the intervenors' bonds and directing the payment to them on account of the overdue interest thereon of their ratable proportion of the fund applicable to that purpose now in the hands of the treasurer of the district. For reasons dicussed at some length during the course of the trial, I think it will be proper to deny the plaintiffs their costs, leaving it to each party to pay his own costs.

Filed May 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows, viz:

That the coupon bonds of the defendant Emmett Irrigation District, bearing date the first day of January, A. D., 1911, being a part of Series No. 1 of the First Issue of Bonds of said District and now outstanding, with the unpaid coupons thereto belonging, being bonds numbered M1 to M4, inclusive, M8 to M127, inclusive, M129 to M130, inclusive, M132 to M219, inclusive, M221 to M262, inclusive, each of the denomination of \$1,000.00, and D1 to D16, inclusive, D23, D44 to D55, inclusive, D62 to D66, inclusive, D83 to D84, inclusive, D86 to D87, inclusive, D90 to D92, inclusive, D111 to D118, inclusive, D120 to D125, inclusive, D131 to D136, inclusive, D139 to D168, inclusive, D172 to D180, inclusive, D196 to D201, inclusive, D204 to D217, inclusive, D220 to D221, inclusive, D227 to D280, inclusive, D283 to D343, inclusive, D345 to D354, inclusive, D361 to D592, inclusive, D594, D595, D597 to D567, inclusive, D659 to D743, inclusive, D746 to D814, inclusive, D827 to D870, inclusive, D987 to D1072, inclusive, D1161 to D1328, inclusive, D1331 to D1332, inclusive, D1383 to D1646, inclusive, each of the denomination of \$500.00, and bonds numbered C1 to C75, inclusive, C77 to C79, inclusive, C81 to

C115, inclusive, C119 to C131, inclusive, each of the denomination of \$100.00, are legal and valid obligations of said Emmett Irrigation District.

That the defendants, and each of them, and the successors in office of the defendants W. H. Shane, N. B. Barnes, E. J. Reynolds and R. B. Shaw, respectively, are hereby perpetually restrained and enjoined from diverting or otherwise appropriating, applying or using for any purpose, other than for the payment of principal and interest as the same, respectively, become due according to the tenor of said bonds, until all of said bonds and the interest coupons thereto belonging have been paid or otherwise discharged, the money collected for or hereafter paid into the Bond Fund created, or required by law to be created, for the payment of the principal of and interest on said bonds; and they, and each of them, are hereby ORDERED and DIRECTED, so far as the matter comes within their official duties, to apply the money now in said Bond Fund, or that may hereafter be paid into said Fund under the tax levied on the 22nd day of October, 1913, first, to the payment of the interest coupons maturing January 1st, 1914, and originally attached or belonging to said bonds so outstanding, as aforesaid, upon the presentation of said coupons, or in the event there is not sufficient money in said Fund to pay all of said coupons in full, then to the pro rata payment thereof; second, after the payment of the January 1st, 1914, coupons in full, then to the payment of the coupons maturing July 1st, 1914, upon the presentation of said cou-

pons, and in the event there is not sufficient money in said Fund to pay all of said last mentioned coupons in full, then to pro rate payment thereof; and, third, the overplus, if any there be, of said tax to the payment of other past due interest coupons originally attached to said bonds and now outstanding and unpaid, in the order of their respective maturities, and if the money in said Fund is not sufficient to pay all the coupons of the same maturity in full, then to the pro rate payment thereof; and in the event any coupon is not paid in full, the amount paid thereon, with the date of such payment, shall be endorsed thereon and the Treasurer of the District may also demand, as evidence to be retained by him of such payment, a receipt from the person presenting such coupon showing such partial payment.

Done in open Court this 16 day of July, 1917.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed July 16, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity, No. 479.

DEFENDANT'S STATEMENT OF EVIDENCE
UNDER EQUITY RULE NO. 75

BE IT REMEMBERED that this cause came regularly on for trial before the court, sitting in equity, at the court room of the above entitled court, at Boise City, Ada County, Idaho, on Monday, the 16th day April, 1917, at the hour of 10

o'clock A. M. on the amended bill of the above named plaintiffs and the amended answer of the above named defendants and the issues made thereon, Richards & Haga of Boise, Idaho, appearing as attorneys and solicitors for each and all said plaintiffs, and J. M. Thompson of Caldwell, Idaho, and Fremont Wood and Dean Driscoll of Boise, Idaho, as attorneys and solicitors for the said defendants and each of them.

Whereupon, the following testimony was introduced and proceedings had:

It was first stipulated and agreed by and between counsel, and thereupon ordered by the court, that it should be understood that each and every party should be deemed to have exceptions taken to all adverse rulings without further mention.

Whereupon, the plaintiffs, by their said attorneys, offered the following evidence in support of the issues on their part:

HARRY S. WORTHMAN, called as a witness on behalf of plaintiffs, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION BY MR. HAGA.

I am Harry S. Worthman and reside at Emmett, Idaho; am a farmer and have been an attorney at law by profession for a number of years. I was secretary of the Emmett Irrigation District from the time of organization in 1910 throughout the year 1911 and W. E. Bell was president during that time. As such I kept the minutes of the Board of Directors proceedings.

The Minutes of Directors' Meeting of January 24, 1911, refer to the bonds in question herein.

Whereupon, the said minutes were read in evidence. From which it appeared that on the 24th day of January, 1911, the board of directors of said district adopted a resolution, providing that the board sell the whole amount of bonds authorized, to-wit, series No. 1, Issue No. 1, or so much thereof as the board might deem feasible, bonds to draw interest at six per cent per annum, payable semi-annually, bids to be received until February 25th, 1911, and directed the secretary to publish notice of the sale of said bonds in accordance with law.

It was further proved by said witness that said secretary gave notice of the sale of said bonds in accordance with law.

And thereupon witness read and there was admitted in evidence the minutes of the board of directors' meeting of February 25th, 1911, whereby it appeared that no bids for bonds had been received.

The witness then read in evidence the minutes of the board of directors' meeting of October 8th, 1911, relating to the bonds here in question, whereby it appeared that the secretary of said meeting presented to the board a form of bond prepared by Adams & Candee, which was adopted by the board.

Witness was then handed instrument purporting to be Bond No. D298 of defendant district, dated January 1st, 1911, and testified that his signa-

ture appeared thereon as secretary, and Mr. Bell's as president; and that he did not know whether it was the form of bond referred to in the minutes last read. The form of bond before the board at the time of the approval of the bond was a typewritten copy. This bond, D298, is lithographed. The adopted copy was returned for the purpose of having it lithographed or engraved. The lithographed bonds were returned to the district in December following. I read them very carefully three or four times before they were signed. I remember that, and I presume they were all alike and I signed the bonds. At the time the bonds were received and opened at the Bank of Emmett I compared the printed form with some forms that I had at the time. I don't know whether it was the original typewritten copy or not but I remember that I read it over carefully and Mr. Craig aided me in comparing it but I did not compare the lithographed bonds one with the other. The lithographed bonds were signed up the latter part of December, I don't know whether it ran into January or not. I do not know whether all the bonds with the exception of numbers, date of maturity and amount of bond read alike. I would have to read every bond before I answered that question. I have not any doubt about it. I found none that did not read the same as the rest and have no reason to believe that they did not read alike, with the exception of the matters referred to.

Whereupon bond numbered D298 was offered and

received in evidence, the following being a true and correct copy thereof:

UNITED STATES OF AMERICA
STATE OF IDAHO
COUNTY OF CANYON.

| | | |
|-----------------------------------|---------------------|-------|
| \$500 | | \$500 |
| Number | EMMETT | First |
| D298 | IRRIGATION DISTRICT | Issue |
| Six Per Cent Municipal Irrigation | District | Bond |
| Series No. 1 Thirteen Year Bond | | |

KNOW ALL MEN BY THESE PRESENTS:
That the EMMETT IRRIGATION DISTRICT, a municipal corporation located in the County of Canyon, State of Idaho, for value received, acknowledges itself to owe and hereby promises to pay to the bearer hereof the sum of

FIVE HUNDRED DOLLARS (\$500)

on the first day of January, A. D. 1924, together with interest thereon from the date hereof until paid at the rate of Six per cent. (6%) per annum, interest payable semi-annually on the first days of January and July in each year upon presentation of the annexed interest coupons as they severally become due. Both principal and interest are payable in lawful money of the United States of America at the office of the Treasurer of the Emmett Irrigation District in the County of Canyon in the State of Idaho, or at the option of the holder hereof, at the Fort Dearborn Trust and Savings Bank in the City of Chicago, Illinois. This bond is one of a series of bonds aggregating One Million One Hun-

dred Thousand Dollars (\$1,100,000) in amount and issued by the undersigned by authority of an act of the Legislature of the State of Idaho entitled: "An Act relating to irrigation districts and to provide for the organization thereof and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9th, 1903, together with acts amendatory thereto and supplemental thereto, the same being known as "Title 14 of the Political Code of the State of Idaho," entitled "Irrigation Districts." Said series consisting of two hundred and sixty-two (262) bonds of the par value of One Thousand Dollars (\$1000) each numbered consecutively from M-1 to M-262, inclusive; Sixteen hundred and forty-six (1646) bonds of the par value of Five Hundred Dollars (\$500) each numbered consecutively from D-1 to D-1646, inclusive, and one hundred and fifty (150) bonds of the par value of One Hundred Dollars (\$100) each, numbered consecutively from C-1 to C-150, inclusive, which are due and payable as follows: Fifty-five Thousand Dollars (\$55,000) in amount being bonds numbered from D-1 to D-110, inclusive, on January 1st, 1922; Sixty-six Thousand Dollars (\$66,000) in amount, being bonds numbered from M-1 to M-7, inclusive, and from D-111 to D-228, inclusive, on January 1st, 1923; Seventy-seven Thousand Dollars (\$77,000) in amount, being bonds numbered from M-8 to M-17, inclusive, and from

D-229 to D-362, inclusive, on January 1st, 1924; Eighty-eight Thousand Dollars (\$88,000) in amount, being bonds numbered from M-18 to M-32, inclusive, and from D-363 to D-508, inclusive, on January 1st, 1925; Ninety-nine Thousand Dollars (\$99,000) in amount, being bonds numbered from M-33 to M-42, inclusive, and from D-509 to D-656, inclusive, and from C-1 to C-150, inclusive, on January 1st, 1926; One Hundred and Ten Thousand Dollars (\$110,000) in amount, being bonds numbered from M-43 to M-57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927; One Hundred and Twenty-one Thousand Dollars (\$121,000) in amount, being bonds numbered from M-58 to M-92, inclusive, and from D-827 to D-998, inclusive, on January 1st, 1928; One Hundred and Forty-three Thousand Dollars (\$143,000) in amount, being bonds numbered from M-93 to M-137, inclusive, and from D-999 to D-1194, inclusive, on January 1st, 1929; One Hundred Sixty-five Thousand Dollars (\$165,000) in amount, being bonds numbered from M-138 to M-192, inclusive, and from D-1195 to D-1414, inclusive, on January 1st, 1930; and One Hundred Seventy-Six Thousand Dollars (\$176,000) in amount, being bonds numbered from M-193 to M-262, inclusive, and from D-1415 to D-1646, inclusive, on January 1st, 1931. And it is hereby certified that all things required by law to be done in and about the organization of said district and the issuance of the said bonds have been done, have happened and have been

performed, and that the issuance of this bond has been duly and legally authorized by vote of the electors of said District at a special election duly called and held in accordance with the provisions of the said act and by resolution of its Board of Directors, and that all other acts, conditions and things required by the laws and constitution of the State of Idaho precedent to and in the issue and delivery of this bond have been done, have happened and have been performed, and that said bonds are the valid, binding and legal obligation of the said District; that all the real property included within said District is subject to the levy of an annual tax for the payment thereof.

IN WITNESS WHEREOF, the said Emmett Irrigation District has by virtue of the authority aforesaid caused this bond to be executed in its name by its President and Secretary, and the Seal of its Board of Directors to be affixed hereto this first day of January, A. D., 1911.

EMMETT IRRIGATION DISTRICT,

By W. E. BELL, President.

Attest: HARRY S. WORTHMAN, Secretary
(Seal Emmett Irrigation District, Emmett, Idaho.)

(Form of Coupon attached.)

On the first day of Jan., A. D. 1924, Emmett Irrigation District will pay to bearer at the office of the County Treasurer of Canyon County, Idaho, or at the option of the holder hereof, at Fort Dearborn Trust and Savings Bank in the City of Chicago, Illinois, the sum of Fifteen Dollars in lawful

money of the United States, being six months interest due that day on its municipal irrigation District Bond of January first, A. D., 1911. Series No. 1. Issue No. 1 No. D298.

HARRY S. WORTHMAN,

Secretary. \$15.00

CROSS EXAMINATION BY DRISCOLL.

Mr. Haylor succeeded me as secretary of the defendant District. The minutes of the Board of Directors of January 2nd, 1912, in Book 2 at page 1-a refer to the election of a secretary for the District. Said minutes were thereupon offered, read and received in evidence, and are as follows, to-wit:

“Regular meeting of the Board of Directors of the Emmett Irrigation District, held at the office of the District at Emmett, Idaho, on the second day of January, 1912, at ten o’clock A. M. of said day. Present, R. B. Wilson, W. H. Shane and C. L. Spaulding. It was moved and seconded that H. Haylor be appointed secretary. Carried.”

The witness further testified that the minutes were signed by R. B. Wilson as president and H. Haylor as secretary. I actually ceased to act as secretary January 2, 1912. I was present at the meeting of that day. Mr. Haylor began to act at that time. I wrote the minutes down to the point where he was appointed secretary and I turned the pencil over to him and he signed the minutes.

It was then stipulated between counsel for plaintiffs and defendants that W. H. Shane succeeded W. E. Bell as a director of defendant District, that he

was elected and the votes of the election canvassed at the Directors' meeting of December 20th, 1911. The following portion of the minutes of the meeting of the board of directors of the defendant District on December 22nd, 1911, were then read and received in evidence:

"Special meeting of the board of directors of the Emmett Irrigation District held at the office of the district at Emmett, Idaho, on the 22nd day of December, 1911, at 3 o'clock P. M. of said day. Present, R. B. Wilson, W. H. Shane and C. L. Spaulding."

The minutes continued: After the bonds were signed they were left in the hands of the Bank of Emmett, Mr. Craig, cashier. I never compared bond No. D-298 with any other bond.

RE-DIRECT EXAMINATION BY MR. HAGA.

The witness read and there was received in evidence the following portion of the minutes of the board of directors of the defendant District of January 2, 1912:

"It was ordered that the secretary send the bond of W. H. Shane to the probate judge for approval, with the request to hand to the register for record, returning same to this office."

And the following: "Minutes of all previous regular and special meetings were read and approved, with the exception that in the minutes of September 26, 1911, where they refer to a certain stipulation relative to the liberty of the Fort Dearborn Trust and Savings Bank, a copy of said stipu-

lation was omitted from said minutes, and a copy of said stipulation is therefore inserted in these minutes."

Witness excused.

The deposition of Ernest C. Glenney of Chicago, Illinois, taken on the 21st day of December, 1915, at Chicago, Illinois, pursuant to stipulation of the respective parties plaintiff and defendant, in behalf of plaintiff, was then read by counsel for plaintiff.

Said witness, being first duly sworn, testified in said deposition as follows

I am Ernest C. Glenney, residing at Chicago, Illinois, and secretary and trust officer of the Fort Dearborn Trust and Savings Bank, and have seen in my official capacity an agreement between this defendant District as party of the first part and J. J. Corkill & Company, parties of the second part, dated September 12, 1911. Whereupon said agreement was offered and received in evidence, the same being a full, true, exact and correct copy of Exhibit "A" attached to and made a part of defendants' answer herein.

All the bonds mentioned in Section Four of said contract aggregating \$1,100,000.00 were delivered to the Fort Dearborn Trust and Savings Bank under that section. \$800,000 of these bonds were received immediately prior to January 5, 1912, and the remaining \$300,000.00 on or about February 29th, 1912. I examined them. They purported to be signed by the officers of the District and sealed by the District seal. Under the provisions of Sec-

tion Five, paragraph (a), I delivered \$469,000 amount of bonds from time to time to the parties of the second part or their order upon surrender of the above mentioned bonds dated June 15th, 1905, or notes dated December 15th, 1908, or notes dated May 1st, 1909, the par value of the bonds of the District so delivered equaling the par value of the above mentioned bonds and notes so surrendered.

Under Section 5-b I delivered \$130,000 par value in amount to the parties of the second part, or their order, upon the surrender of \$100,000 of second and collateral trust bonds. The par value of the District bonds so delivered equalling the par value of said notes so surrendered, together with accrued interest to July 1st, 1911.

Under the provisions of Section 5-c and that part of the contract beginning with the sentence on page 8, fifth line from the bottom, "said Depositary is and shall be in writing authorized," etc., and continuing through the third line of page nine of said contract, we delivered from time to time an amount of bonds equal to twenty-five per cent of the bonds and notes which had been exchanged, meaning by the latter, bonds and notes of the Canal Company referred to in the agreement.

Under paragraph 5-d and the first paragraph on page 9 of said contract, beginning at the middle of fifth line from the top thereof, we delivered to the parties of the second part \$148,900 of bonds. The total amount of bonds delivered to parties of the second part or their order is \$897,600. We have delivered

\$25,000 par value of said bonds to the defendant District in addition and have in our possession now \$177,400 par value, the number, denominations and amounts in our possession being as follows:

| | |
|---|-------------|
| Nos. C-132 to 150, inclusive, at \$100..... | \$ 1,900.00 |
| Nos. M-5 to 7, inclusive, at \$1000..... | 3,000.00 |
| No. 17, at \$1000..... | 1,000.00 |
| No. 128, at \$1000..... | 1,000.00 |
| No. 131, at \$1000..... | 1,000.00 |
| No. 220, at \$1000..... | 1,000.00 |
| Nos. D-17 to 22, inclusive, at \$500..... | 3,000.00 |
| Nos. 24 to 43, inclusive, at \$500..... | 10,000.00 |
| Nos. 56 to 61, inclusive, at \$500..... | 3,000.00 |
| Nos. 67 to 82, inclusive, at \$500..... | 8,000.00 |
| No. 85, at \$500..... | 500.00 |
| Nos. 88 and 89, at \$500..... | 1,000.00 |
| Nos. 93 to 110, inclusive, at \$500..... | 9,000.00 |
| No. 119, at \$500..... | 500.00 |
| Nos. 126 to 130, inclusive, at \$500..... | 2,500.00 |
| Nos. 136 to 138, inclusive, at \$500..... | 1,500.00 |
| Nos. 169 to 171, inclusive, at \$500..... | 1,500.00 |
| Nos. 181 to 195, inclusive, at \$500..... | 7,500.00 |
| Nos. 202 and 203, inclusive, at \$500..... | 1,000.00 |
| Nos. 218 and 219, inclusive, at \$500..... | 1,000.00 |
| Nos. 222 to 226, inclusive, at \$500..... | 2,500.00 |
| Nos. 281 and 282, inclusive, at \$500..... | 1,000.00 |
| No. 344, at \$500..... | 500.00 |
| Nos. 355 to 360, inclusive, at \$500..... | 3,000.00 |
| No. 593, at \$500..... | 500.00 |
| No. 596, at \$500..... | 500.00 |
| Nos. 744 and 745, at \$500..... | 1,000.00 |

| | |
|---|---------------------|
| Nos. 815 to 826, inclusive, at \$500..... | 6,000.00 |
| Nos. 871 to 896, inclusive, at \$500..... | 58,000.00 |
| No. 1067, at \$500..... | 500.00 |
| Nos. 1073 to 1160, inclusive, at \$500..... | 44,000.00 |
| Nos. 1329 and 1330, at \$500..... | 1,000.00 |
| Total..... | <u>\$177,400.00</u> |

Under Section 5-d parties of the second part have paid to us the following amounts at the following times:

March 4th, 1912, \$18,000.00; March 7th, 1912, \$30,000.00; March 8th, 1912, \$1,995.00; April 19th, 1912, \$60,000.00; April 24th, 1912, \$5,000.00; April 30th, 1912, \$4,000.00; May 8th, 1912, \$2,000.00; May 13th, 1912, \$3,000.00; May 21st, 1912, \$5,000.00; July 12th, 1912, \$5,000.00; September 25th, 1912, \$30,420.00; September 2nd, 1913, \$20,200.00 (\$5,000.00 of which, however, was immediately withdrawn by Corkill & Company in the understanding that coupons from these bonds dated January 1st, 1913, to this amount of \$5,000.00 in the hands of the depositary uncanceled be cancelled as a credit to the District)."

We paid the January 1st, 1912, July 1st, 1912, and January 1st, 1913, coupons cut from these bonds. The January 1st, 1912, coupons maturing prior to the delivery of the bonds to us were paid because their payment was taken into consideration in the arrangement for the exchange of old securities, it being provided in the exchange arrangements that the persons receiving these bonds were to receive the January 1st, 1912, coupons attached.

We received the following amounts of money at the following times from the Trustee under the mortgages issued by the Canyon Canal Company mentioned in paragraph three, on page five of the contract, to-wit:

March 29, 1912,....\$17,539.21

April 5, 1912..... 5,387.50

April 16, 1912..... 1,598.75

A total of.....\$24,525.46

The original agreement now handed me, marked Plaintiff's Exhibit "C" to the deposition, dated September 12, 1912, between the Emmett Irrigation District as party of the first part and J. J. Corkill & Company, parties of the second part, is the agreement under which a portion of the bonds were delivered by us, whereupon said agreement, which was duly executed, was offered in evidence and admitted, the same reading as follows, to-wit:

"WHEREAS, the parties hereto have made and entered into a contract for the sale and exchange by the District to the parties of the second part of ONE MILLION ONE HUNDRED THOUSAND (\$1,100,000.00) DOLLARS in amount of the bonds of said District, which contract was dated September 12, A. D. 1911, the terms, conditions and provisions of which were modified and changed by various subsequent collateral agreements between said parties; and

WHEREAS, there has arisen various disputes and differences of opinion between the parties here-

to concerning the terms and conditions for the purchase and exchange of said bonds as aforesaid, but as all of said controversies have been adjusted to the satisfaction of both parties hereto, the District desires to extend the time for the purchase of the unsold portion of said bonds and the parties of the second part agree to take up and pay for said unsold bonds, subject to the terms, conditions and provisions as contained in said contract of September 12, A. D. 1911 and said agreements supplementary thereto, except as said terms, conditions and provisions are modified and changed by the provisions of this instrument.

NOW THEREFORE, in consideration of the sum of ONE (\$1.00) DOLLAR in hand paid to the party of the first part by the parties of the second part, and other good and valuable considerations, the receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants and agreements contained in said contract of September 12, 1911 and said contracts collateral thereto, and herein, the District agrees to extend the time for taking up and paying for said unsold bonds, and the parties of the second part agree to take up and pay for said unsold bonds, subject to the terms, conditions and provisions of said contracts, except as the same are modified, changed and abrogated herein; and

I. The parties of the second part agree to take up and pay for the unsold bonds of the District, being the unsold portion of the TWO HUNDRED AND EIGHTY THOUSAND (\$280,000.00) DOL-

LARS in amount of bonds mentioned in paragraph (d) of Section 5 of said contract dated September 12 A. D. 1911, at the following times:

Thirty Thousand (\$30,000.00) Dollars in amount upon the execution of this instrument, subject to the conditions and provisions hereinafter mentioned.

Ten Thousand (\$10,000.00) Dollars in amount October 15, 1912.

Five Thousand (\$5,000.00) Dollars in amount November 15, 1912.

Eight Thousand (\$8,000.00) Dollars in amount December 15th, 1912;

and the balance of said unsold bonds mentioned in said paragraph (d) of said Section Five within thirty days after all interest due on the outstanding bonds of the District has been collected and remitted to the Depositary, also within thirty days after the order of confirmation of the apportionment of benefits proceedings instituted in the District Court of Canyon County by the District becomes final, the evidence of the finality of said judgment of confirmation to be evidenced by a certificate of the Clerk of the District Court of Canyon County, Idaho, which said certificate shall be filed with the said depositary, said payments shall be considered to apply only upon the principal of said bonds at par, the accrued interest thereon to be paid additional thereto at the time said principal sums are paid, and upon making such payments the parties of the second part shall be entitled to take up and receive from the depositary mentioned in said con-

tract of September 12, 1911, such respective amounts of bonds mentioned in said paragraph (d) of Section 5 and also the proportionate amount of bonds mentioned in paragraph (c) of Section 5 of said contract of September 12, 1911, upon the terms and conditions therein and elsewhere in said contract specified.

II. The payment of the Thirty Thousand (\$30,000.00) Dollars to be made on the date of the execution of this instrument, shall be deposited with Fort Dearborn Trust and Savings Bank of Chicago to be forwarded to the Boise City National Bank of Boise, Idaho, to be paid out upon the order of the President and Secretary of said District, said funds being for the benefit of the District in the acquisition and purchase of flumes, for the flumes of the District already contracted for.

III. The parties of the second part further agree to provide funds sufficient to pay the outstanding coupons of the District, which mature January 1st A. D. 1913 and, upon making such deposit, on or before December 31st, A. D. 1912, the party of the second part shall be entitled to receive interest warrant or warrants properly executed by the District for the amount so deposited; such interest warrant or warrants shall contain proper endorsements showing that the same has been presented for payment and that no funds are available, in order that interest at seven (7%) per cent. may run on said warrants from and after January 1st, A. D. 1913, in conformity with the statutes of Idaho regulating the same.

IV. The District agrees that on or before December 15th A. D. 1912, the Board of Directors shall pass a resolution, reciting that it is impossible because of the shortness of time to collect the full amount of the interest due on its outstanding interest coupons which mature January 1st 1913, and authorizing a loan, with interest at seven (7%) per cent. from the parties of the second part for that purpose, giving its warrants therefor.

V. It is mutually agreed by the parties hereto that Twenty Thousand (\$20,000.00) Dollars in amount of the bonds mentioned in said paragraph (d) of Section 5, and Five Thousand (\$5,000.00) Dollars in amount of bonds mentioned in paragraph (c) of Section 5 of said contract dated September 12, A. D. 1911, shall be immediately returned to the District by the depositary mentioned in said contract, free from all claims or demands whatsoever of the parties of the second part, and this paragraph shall be construed as instructions to said depositary to make such return at once.

VI. WHEREAS, in accordance with the terms and provisions contained in said contract of September 12 A. D. 1911, the funds held by the Continental Commercial Trust and Savings Bank, Trustee, of Chicago, Illinois, were turned over to the District and used by it in its construction fund, and inasmuch as said funds amounting to \$24,783.00, more or less, were paid to said Trustee by the settlers to provide for the payment of the principal and interest of the outstanding bonds and notes of

The Canyon Canal Company, Limited, and therefore said funds were by mistake placed in the construction fund of the District, instead of being placed in the bond and interest fund of said District, and, whereas, the parties of the second part took up and paid for part of the bonds of the District and, in accordance with the provisions of said contract of September 12, 1911, paid its accrued interest on said bonds which was also turned over to the District and by mistake was placed in the construction fund instead of being placed in the interest fund where it properly belonged, therefore, in order to correct said error and to place said moneys in their proper funds, the District agrees that the Board of Directors of the District shall pass a resolution reciting the above facts and authorizing and directing that the total amount of money received from the Continental Commercial Trust and Savings Bank, Trustee, all accrued interest which has been received on the bonds sold, and also such further accrued interest as may from time to time be paid, be transferred from said construction fund to said bond and interest fund, that upon deposit of the accrued interest with the Depositary the same shall be repaid to Corkill & Co. upon proper endorsements by said Depositary upon interest warrants of the District held by Corkill & Co.

VII. The parties of the second part agree to cause the immediate release and cancellation of as many of the water contracts of the Canyon Canal Company, Limited, as possible under existing cir-

cumstances and the return of said contracts to the respective owners.

VIII. It is mutually covenanted and agreed by the parties hereto that time is the essence of this contract, and that as all the differences between the parties hereto have been satisfactorily adjusted, the provisions and conditions relative to an arbitrator, mentioned and provided for in the collateral agreement of September 26th, A. D. 1911 is hereby abrogated and is declared to be null and void and of no further effect, and upon any default or defaults of the parties of the second part of any of the terms and conditions herein provided for, at the time and manner herein provided, this agreement shall be construed as an irrevocable order upon said depository to return the unsold bonds of the District mentioned in paragraph (d) of section 5, and also the bonds mentioned in paragraph (c) of section 5 of said contract of September 12, A. D. 1911, as the order or orders of said District may specify; PROVIDED, however, that any legal proceeding or proceedings instituted by the District, its directors, officers or land owners, restraining the parties of the second part from performing this contract shall be construed as leaving the matters involved in this contract in statu quo during the pendency of such action or actions, unless there has been a prior breach thereof by the parties of the second part; provided further that at the option of the District such restraining order or orders, procured upon suit other than by the said District, shall not extend

the times of such payment or payments more than sixty days from the specified time for making the same.

IX. It is further understood and agreed by the parties hereto that payments of money to the Fort Dearborn Trust and Savings Bank to the credit of the Emmett Irrigation District, or for its benefit, shall be treated and considered in all respects as payments to the District.

It is further agreed that when the parties of the second part take up and pay for the balance of said unsold bonds mentioned in paragraph I above, they shall be entitled to turn in as cash interest warrants of the District to a total amount of the moneys received by the District from the said Continental Commercial Trust and Savings Bank, and all accrued interest from bond sales.

X. It is further agreed between the parties hereto that said depositary be instructed to notify the District as to the amount of all payments on account of accrued interest on said District bonds, and the District agrees that it will place such funds in the bond interest account and that it will not use the same for construction purpose.

XI. For convenience this instrument shall be executed in triplicate, each of which copies shall be deemed an original, and one copy shall be transmitted to said Depositary, Fort Dearborn Trust and Savings Bank.

XII. It is understood between the parties that the disbursement of the Thirty Thousand (\$30,-

000.00) Dollars through The Boise City National Bank of Boise, Idaho, as provided in paragraph II of this instrument, is to be alone upon the order of the President and Secretary of said District, and without instruction as to the purposes for which said funds are to be used.

XIII. It is further understood and agreed that the second parties will cause the release, under seal, properly acknowledged, by the Canyon Canal Company, of all outstanding water contracts existing between said Canyon Canal Company and all the land owners in said District, which said water contracts are not included in the trust agreement from the District to Chicago Title and Trust Company and Charles G. Frank both of Chicago, Illinois, which said trust agreement was executed by the District in February 1912, and is now of record in Canyon County, Idaho, it being the intention hereby to secure the immediate release by said Canyon Canal Company of all outstanding water contracts upon lands in said District not enumerated in said trust agreement. Such release, properly executed, shall be deposited with the said depository upon the execution and delivery of this agreement and upon the payment of the said sum of Thirty Thousand (\$30,000.00) Dollars, such release to be transmitted by the said depository to the District.

A portion of the bonds were delivered under an agreement bearing date April 5th, 1913, between Emmett Irrigation District, party of the first part and Corkill & Company parties of the second part,

which agreement I now hold. Whereupon, said agreement which was duly executed was offered and admitted in evidence, the same being as follows:

I.

THE DISTRICT AGREES;

(a) To use its best efforts to secure without delay the confirmation by the District Court of the Seventh Judicial District of the State of Idaho for Canyon County of the assessments and apportionment of benefits made by the Board of Directors of the said District under the first issue of One Million One Hundred Thousand Dollars (\$1,100,000.00) of the bonds of said District.

(b) To sell to the Company Two Hundred Thousand Dollars (\$200,000.00) par value, of the legally issued coupon bonds of the said first issue of the bonds of said District, such bonds to be deposited with the Fort Dearborn Trust and Savings Bank of Chicago, Illinois, with instructions to deliver to the Company, upon payment of par and accrued interest, in installments as follows, to-wit:

On or before September 1st, 1913, not less than Twenty Thousand Dollars (\$20,000.00) and not less than Twenty Thousand Dollars on the first day of each and every month thereafter until the Company has taken and paid for the full amount of Two Hundred Thousand Dollars of said bonds.

(c) To Deposit with the aforesaid Fort Dearborn Trust and Savings Bank, before the first day of July, 1913, the semi-annual interest maturing on said first day of July, 1913, on all bonds of the Dis-

trict then outstanding, and to promptly pay at maturity the semi-annual interest maturing January 1, 1914, on all bonds of the District outstanding on said date.

(d) To pay to the Company Five Thousand Dollars (\$5,000.00) upon receipt of the first payment of Twenty Thousand Dollars on the purchase of said Two Hundred Thousand Dollars of bonds, and a like amount on receipt of each and every subsequent payment made by the Company, such payments to be applied on the amount due the Company on certain warrants now held by the Company, aggregating approximately Twenty-Four Thousand Seven Hundred Eighty-three Dollars (\$24,783.00), par value, dated July 1, 1912, and bearing interest at the rate of seven per cent. (7%) per annum, and also upon certain interest coupons maturing January 1, 1913, and detached from the bonds of the District outstanding at said date, which said interest coupons aggregate approximately Twenty Six Thousand Three Hundred Twenty-eight Dollars (\$26,328.00) and bear interest at the rate of seven per cent. per annum from the first day of January, 1913; said payments by the District to continue until the said warrants and coupons with the interest thereon have been fully paid, but in the event the Company shall purchase and pay for more than Twenty Thousand Dollars par value of bonds during any one month, the said payments by the District shall be increased so as to equal twenty-five per cent. (25%) of the amount of the bonds taken

and paid for by the Company during such month; and upon receipt of the last installment of said purchase price, the District shall pay the full amount of the balance due the Company on account of said warrants and coupons. All payments shall be made through said Fort Dearborn Trust and Savings Bank, and proper credit shall be made on the warrants, and as any warrant or coupon, with interest thereon, is fully paid the same shall be cancelled and returned to the District.

II.

THE COMPANY AGREES:

(a) To purchase at par and accrued interest Two Hundred Thousand Dollars (\$200,000.00) par value, of the first issue of the legally issued coupon bonds of said District, and to pay for the same in installments as hereinbefore stated, to-wit:

Not less than Twenty Thousand Dollars (\$20,000.00) and accrued interest, on or before the first day of September, 1913, and not less than Twenty Thousand Dollars and accrued interest on or before the first day of each and every month thereafter until the said total amount of Two Hundred Thousand Dollars par value, and accrued interest, (but not including matured coupons) has been taken and paid for.

(b) To deposit with the Fort Dearborn Trust and Savings Bank of Chicago, Illinois, simultaneously with the deposit by the District of the interest maturing July 1, 1913, on the bonds of said District, but only upon ten days' notice that the District is

prepared to make such deposit and only upon condition that the apportionment or assessment of benefits against the lands in the District shall have been confirmed by the said District Court in the form and manner required by the laws of the State of Idaho, all warrants issued to the Company by the District, being three in number, dated January 1, 1913 and aggregating at par Twenty Four Thousand Seven Hundred Eighty-Three Dollars, and bearing interest at the rate of seven per cent. (7%) per annum, being the warrants hereinbefore mentioned; also all coupons aggregating approximately Twenty Six Thousand Three Hundred Twenty-eight Dollars, maturing January 1, 1913, and detached from the said first issue of the bonds of said District, also hereinbefore mentioned, such warrants and coupons to be held by said Fort Dearborn Trust and Savings Bank during the life of this agreement (except as they may from time to time be paid and cancelled and returned to the District as herein provided), as a guarantee for the faithful performance by the Company of its agreement to purchase and pay for said bonds in installments as hereinbefore set forth. And upon the failure of the Company to take and pay for Twenty Thousand Dollars, par value, and accrued interest (but not including matured coupons) of the said bonds of the District, on or before the first day of each and every month, commencing September 1, 1913, and continuing until it has taken the said full amount of Two Hundred Thousand Dollars and accrued interest, the

said Fort Dearborn Trust and Savings Bank shall be authorized and directed, and it is hereby authorized and directed to deliver to the District immediately upon such default on the part of the Company, the said warrants and coupons, and the remaining unsold bonds and the said warrants and coupons shall thereupon become the absolute property of the District, and the Company shall forfeit all right thereto and to the moneys due thereunder.

(c) To use its best efforts to secure the release of all water contracts covering lands in the District which are now held in trust by the Chicago Title and Trust Company, under a trust agreement between said Company and the District; and the time allowed the District in which to secure the confirmation of the assessments and apportionment of benefits by the said District Court shall be extended after the time limits herein fixed for a period equal to the delay in securing the release or cancellation of said water contracts.

III.

IT IS MUTUALLY AGREED:

(a) That the obligations of the Company to purchase or take bonds of the District and to deposit and keep on deposit with the said Fort Dearborn Trust and Savings Bank the said warrants and coupons, or to do any other thing required of it hereunder, are expressly conditioned and dependent upon the faithful performance by the District, at the time and in the manner herein contemplated, of the covenants and obligations herein contained and by it to

be kept and performed, and upon the prompt and punctual payment of the interest on the bonds now outstanding, or that may be outstanding during the term of this agreement; and upon default by the District in any of its covenants hereunder the Company shall at its option be released from all obligations hereunder and the said warrants and coupons, (excepting such as may have been paid, cancelled and returned to the District), deposited with the said Fort Dearborn Trust and Savings Bank for the faithful performance of this agreement on the part of the Company, shall, at the option of the Company and upon its demand, be returned and delivered to the Company; but the District shall be given due credit for all payments made thereon.

(b) That the Company may deduct from the amounts paid the District monthly on account of the purchase of said bonds the amount payable to the Company, as hereinbefore provided, on account of the said warrants and coupons deposited with the Fort Dearborn Trust and Savings Bank, as aforesaid, and remit to the District the balance only of such payments; and the District agrees in such event to make proper credit on its books by transfer from the interest or Maintenance fund to the Construction fund of the amount payable to the Company and retained by it from the payment due the District on account of the purchase of said bonds and out of the last payment due the District on account of said purchase, the Company may deduct the sum or balance required, if any, to fully pay

and discharge such warrants and coupons, held as aforesaid, with interest thereon.

(c) That all agreements heretofore entered into between the parties hereto, relative to the purchase and sale of the bonds of the District, are hereby cancelled, annulled and superseded by this agreement, and the relations of the parties hereto shall from henceforth be determined, settled and adjusted according to the terms of this agreement, and each of the parties hereto, for the consideration aforesaid, does hereby release the other, its successors and assigns, of and from each and all obligations contained in any and all agreements heretofore entered into relative to the purchase and sale of said bonds, and from all damages, claims, demands, actions, causes of actions, controversies and accounts of whatsoever kind, growing out of or which might or could arise or accrue from or under or by reason of any contract or agreement heretofore entered into by the parties hereto.

(d) That the Company shall on or before the 15th day of April, 1913, deposit with the said Fort Dearborn Trust and Savings Bank the warrants hereinbefore mentioned, dated July 1st, 1912, and aggregating approximately Twenty Four Thousand Seven Hundred Eighty-three Dollars, as a guarantee that it will and can comply with the provisions of sub-paragraph (b) of paragraph II hereof relative to the deposit of said warrants and the coupons therein mentioned, upon deposit by the District before July 1st, 1913, of the interest maturing on said date on its then outstanding bonds. But it is ex-

pressly agreed that if the District fails to secure the judgment or decree of the District Court confirming the apportionment or assessment of benefits by the 15th day of June, 1913, then and in that event the said Fort Dearborn Trust and Savings Bank shall return said warrants to the Company, and the latter shall thereupon be released of all obligations hereunder. But if the assessment and apportionment of benefits be confirmed by the Court, to the extent and in the manner required by the laws of the State of Idaho in such cases, on or before the 15th day of June, 1913, then the said warrants shall be held by the said Fort Dearborn Trust and Savings Bank as a guarantee that the Company will comply with the terms of said sub-paragraph (b) of paragraph II hereof. And upon failure of the Company to so comply, the said Fort Dearborn Trust and Savings Bank shall deliver said warrants to the District and the Company shall thereupon forfeit all right thereto and to all moneys due thereunder.

(e) That should an appeal be taken from the decree of the District Court confirming the apportionment of benefits, the time within which the said installments of the purchase price of said bonds shall be made by the Company shall be extended for a period equal to the time intervening between the filing of the Notice of Appeal and the filing of the remittur of the Supreme Court. And in the event the Supreme Court should reverse or set aside said decree, or in the event the decree confirming the apportionment of benefits has not become final by the

first day of November, 1913, the Company shall, at its option, be released of all obligations hereunder, and the said Fort Dearborn Trust and Savings Bank shall return to the Company, upon demand, the warrants and coupons deposited with it as aforesaid, and shall return to the District the said bonds.

Parties of the second part caused to be assigned to us an unsecured claim or claims of the Canyon Canal Company held by Trowbridge and Niver Company, by delivering the same to us in accordance with section two, page 4 of the contract of September 12, 1911, which assignment we still have in our possession. The opinion of Adams & Candee, mentioned in the first paragraph, at the top of page five of the contract of September 12, 1911, was deposited with us, bearing date April 8, 1912, signed by Adams, Candee, Steere & Hawley, successors to Adams & Candee, a true and correct copy of which is as follows, to-wit:

“Law Offices

Adams, Candee, Steere & Hawley

515 Monadnock Block

Chicago

April 8, 1912.

We hereby certify that we have examined certified copies of the records of the Board of Directors of EMMETT IRRIGATION DISTRICT, a municipal irrigation district organized and existing under and by virtue of TITLE 14 of the Revised Codes of Idaho, in the County of Canyon, in the State of Idaho, relating to the issue by said District of its negotiable Six Per Cent Coupon Bonds, dated January 1,

A. D. 1911, aggregating One Million One Hundred Thousand Dollars (\$1,100,000) in amount, consisting of 262 bonds of the par value of \$1,000 each, 1,646 bonds of the par value of \$500 each, and 150 bonds of the par value of \$100 each, all of which bonds mature serially from January 1, A. D. 1922, to January 1, A. D. 1931, inclusive, and we are of the opinion that said Municipal Irrigation District had lawful authority for the issuance of said bonds under the laws of the State of Idaho, now in force.

We have also examined the form of bond adopted by the Board of Directors of the District for such issue and approve of such form and we are of the opinion that said bonds are the valid, legal and binding obligations of said District, and that the patented land, the interest of the respective owners of the lands held by the certificates of sale by the State of Idaho and in the lands entered but not yet patented, comprising said District, are subject to the lien of a tax to pay the same.

We have also examined a certified copy of the transcript of the proceedings for the organization of said District and all of the proceedings taken for the issuance of the bonds of said District which have been judicially examined, approved and confirmed by the Supreme Court of the State of Idaho (see Volume 113 Pacific Reporter, page 444).

(Signed) ADAMS, CANDEE, STEERE
& HAWLEY

To J. J. Corkill & Company,
Fort Dearborn Trust and Savings Bank,
Chicago, Illinois."

Bonds delivered up to September 12, 1912, were delivered in accordance with the provisions of the contract dated September 12th, 1911 and thereafter, up to April 5th, 1913, in accordance with the original contract as amended by the contract of September 12th, 1912, and after April 5th, 1913, in accordance with the provisions of the original contract as amended by both the supplemental contracts.

I know the work required and expense incurred in exchanging Canyon Canal Bonds for bonds of the Defendant District. I have no means of knowing the exact amount of money expended or the efforts expended therein, but I do know it was considerable. It required a great amount of correspondence on the part of the depository, and it required personal visitation and solicitation on the part of the employees of Corkill & Company. We were in daily communication during this time with Corkill and his employees relative to the exchange of these bonds; \$599,000.00 in amount of Canyon Canal securities were deposited with us for the purpose of exchange under the provisions of the following form of agreement:

“KNOW ALL MEN BY THESE PRESENTS, That Whereas, the Canyon Canal Company, a corporation organized under the laws of the State of Idaho has heretofore made, executed and issued certain bonds and notes as follows:

Three Hundred and Fifty Thousand Dollars (\$350,000) First Mortgage Six Per Cent Gold Bonds

numbered from one (1) to six hundred and twenty (620) inclusive, dated June 15, 1905, and secured by a mortgage or deed of trust of the same date, which said bonds were due serially, beginning July 1, 1907, and ending July 1, 1916, and of which One Hundred and Seventy Thousand Dollars (\$170,000) in amount are now autstanding and unpaid;

One Hundred Thousand Dollars (\$100,000) Second Mortgage Bonds, dated July 1, 1906, secured by a collateral trust mortgage to THE AMERICAN TRUST AND SAVINGS BANK, as Trustee, and certain collateral securities deposited thereunder and held by the said Trustee, which said bonds are all now outstanding in default and unpaid;

One Hundred Thousand Dollars (\$100,000) Collateral Trust Notes, dated December 15, 1908, and secured by a trust agreement with the AMERICAN TRUST AND SAVINGS BANK, of the same date, and certain collateral securities deposited with the Trustee thereunder, a portion of which said notes are now due and in default;

Two Hundred and Fifty Thousand Dollars (\$250,000) Collateral Trust Notes, dated May 1, 1909, and secured by a collateral trust agreement with the AMERICAN TRUST AND SAVINGS BANK, dated April 20, 1909, of which \$200,000 are now outstanding, on which said notes default has been made in the payment of interest;

And whereas, the EMMETT IRRIGATION DISTRICT, a Municipal Corporation, organized under the laws of the State of Idaho, and comprising and

containing the land irrigated by means of the irrigation system of the said CANYON CANAL COMPANY, proposes to purchase and take over the said irrigation system and to improve and extend the same, and for such purpose has authorized an issue of bonds of the DISTRICT to the amount of One Million, One Hundred Thousand Dollars (\$1,100,000) ; and

Whereas, arrangements have been made for the purchase by the said EMMETT IRRIGATION DISTRICT of all of the properties of the said CANYON CANAL COMPANY and the delivery of certain of the bonds above mentioned in payment therefor to an amount sufficient to enable the said CANYON CANAL COMPANY to exchange bonds of the said Irrigation District for all of the said outstanding bonds and notes of the said CANYON CANAL COMPANY, NOW, THEREFORE,

THE UNDERSIGNED, being the owner and the holder of the following bonds and notes of the issues of the said CANYON CANAL COMPANY hereinabove described, namely:

.....Dollars (\$) of the said first Mortgage Six Per Cent Gold Bonds, dated June 15, 1905, numbered.....Dollars (\$) of the said Second Mortgage Bonds, dated July 1, 1906, numbered.....Dollars (\$) of the said Collateral Trust Notes, dated December 15, 1908, numbered.....Dollars (\$) of the said Collateral Trust Notes, dated May 1, 1909, numbered.....

.....does hereby agree to accept in exchange for his said bonds and notes bonds of the said EMMETT IRRIGATION DISTRICT, above mentioned, of par value equal to the par value of his said bonds and notes, provided, however, the legality of the said municipal irrigation district bonds shall be approved by Adams & Candee, Attorneys of Chicago, Illinois.

Such exchange shall apply only to the principal of his said bonds and notes. The undersigned is to be paid in cash all accrued interest now remaining unpaid on his said bonds and notes, deducting therefrom, however, all interest accrued on the next maturing coupon of the said Irrigation District Bonds, and the undersigned does hereby agree to deposit with the FORT DEARBORN TRUST AND SAVINGS BANK OF CHICAGO, ILLINOIS, his aforesaid bonds and notes for the purpose of effecting the said exchange, such exchange to be made without expense to the undersigned of any kind or nature whatsoever.

And the undersigned does hereby authorize the Committee heretofore acting on behalf of the holders of the said Notes dated December 15, 1908, and May 1, 1909, to deposit with the said FORT DEARBORN TRUST AND SAVINGS BANK, for the purpose hereinbefore stated, such of his said Notes and Bonds as the undersigned had heretofore deposited with the Chicago Title & Trust Company, under the Noteholders' agreement with the said Committee.

Name

Address''

All the securities of the Canyon Canal Company, mentioned in said agreement of September 12, 1911, were delivered to us under an agreement substantially in the foregoing form.

CROSS-EXAMINATION BY MR. WOOD

All the bonds were signed by the same names, Mr. Bell as President and Mr. Worthman as Secretary. Some months previous to the delivery of the district bonds work was under way for their exchange for the securities of the Canyon Canal Company. The old securities were deposited with the Fort Dearborn Trust and Savings Bank—whereupon we issued certificates of deposit therefor, exchangeable for the District bonds when available. All Canyon Canal securities were assembled before any exchanges were made. The District bonds were delivered by the Depositary to the owners of the Canyon Canal Bonds soon after March 1st, 1912—within a few days. That delivery involved approximately \$600,000 in amount of the District bonds.

At that time we delivered Corkill & Company approximately \$150,000 of District bonds but had delivered Corkill & Company none prior to that time. It would not be possible from our records to ascertain what bonds we gave Corkill & Company, which would be identified as the item of approximately \$150,000, at the time he made the exchange with the holders of the Canyon Canal securities. All the bonds aside from the \$600,000 involved in the exchange were delivered to Corkill & Company. We have no memoranda by which we could identify

the numbers or denominations of any specific delivery of bonds to Corkill & Company. Some of the \$600,000 exchanged were delivered to Corkill & Company for other people. We have a record of the bonds passing out of our hands after the \$750,000 exchange was made. A strict account of the numbers was not kept, for Corkill & Company were continuously exchanging bonds for bonds of different denominations or maturities. It does show the amount of the par value of the bonds that were taken out from time to time. Aside from the denominations and dates and maturities the bonds were all alike. I think we still have a record at present of the names of the persons receiving the bonds of the Emmett Irrigation District in exchange for the securities of the Canyon Canal Company. I decline to produce a list of those purchasers or the persons receiving these bonds, for I do not feel that we should exhibit the list, for the reason that we had an understanding at the time the trust was taken over that the matter would be treated from a fiduciary standpoint, and especially in regard to the names of the persons from whom we received the Canal securities. After the first exchange of \$600,000 was made, all bonds were delivered to Corkill & Company and no record of purchasers was made. The first cash paid in by Corkill & Company for bonds delivered to them was March 4, 1912. I have no record of what bonds they obtained at that time. When a delivery of bonds was made to Corkill & Company they were given their choice as to

what particular bonds they were to have, insofar as the same could be complied with. They could have been bonds all maturing upon one date, or apportioned over a considerable portion of the maturity periods. It was left entirely to their selection. There was no attempt on the part of the depository to pro-rate or proportion any given issue of the bonds with reference to any dates of maturity. This applies to the entire issue. The money for the payment of the January 1st, 1912, interests and the July 1st, 1912 and January 1st, 1913, interest was received from Corkill & Company.

The January 1st, 1912, July 1st, 1912, and January 1st, 1913, were paid by funds furnished by Corkill & Company and the July 1st, 1913, payment, amounting to \$26,328, was paid by funds received from the District. No other direct payment on account of interest was made by the District.

There was no particular classification ever made of the bonds designating the particular bonds to be used for any of the various purposes mentioned in the original contract. We delivered \$20,000 in bonds of the District to Corkill & Company under the contract introduced in evidence, bearing date April 5th, 1913, as their first payment under that contract. Corkill & Company made no payments under the contracts after September, 1913.

RE-DIRECT EXAMINATION

We received from the American Trust and Savings Bank, Trustee under the various mortgages securing the Canyon Canal securities, the cash men-

tioned in section eight of the contract of September 12, 1911, and put it to the credit of the Emmett Irrigation District.

RE-CROSS-EXAMINATION BY MR. WOOD

Corkill paid in \$30,000 and interest and received \$37,500 par value of bonds under the second contract of September 12, 1912. All the bonds delivered to Corkill & Company were delivered under the original contract of September 12, 1911, except those delivered under the contract of September 12, 1912, and the contract of April, 1913.

R. B. SHAW was then called as a witness in behalf of said plaintiffs, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HAGA

I am R. B. Shaw and have resided 13 years at Emmett, Gem County, Idaho. I am, and have been treasurer of the defendant District since February, 1913, and have the custody of the funds of the District. I have an interest fund for the payment of bond interest, containing approximately \$8,000.00. It is made up from the collection of the 1913 levy for bond interest. The total levy was more than I have in the fund. It was about five per cent on the present outstanding bonds, which bonds amounted to \$900,000.00. Rather it was 6 per cent on the amount of the sale. I have not paid any interest coupons from the fund. Because the Board ordered not to pay it. The coupons of the plaintiffs in this case were presented for payment and payment refused. An aggregate of coupons maturing July 1st

and January 1st, 1914, on bonds outstanding would be approximately \$54,000. There was probably \$2,000.00 less in the funds at the time the coupons were presented than there is now.

H. HAYLOR, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HAGA

I am H. Haylor and reside at Emmett, Idaho. I am secretary of the defendant District, succeeding Mr. Worthman. Have been secretary ever since. I have here the minute books of the meetings of the board of directors for the years 1914 and 1915 and 1916. No interest levy was made in the year 1914 by the board of directors to pay interest on the outstanding bonds of the District. A resolution was passed with relation to the matter at an adjourned regular meeting on October 31st, 1914, recorded on page 29 of the minute book. Which said minutes were then read by the witness in evidence, without objection. The same being as follows:

“Whereas a prior board of directors of the Emmett Irrigation District on the 12th day of September, 1911, made a contract to dispose of certain bonds of the Emmett Irrigation District, a copy of which contract is found in minute book No. 1, pages 57 to 64 inclusive, records of the Emmett Irrigation District, and it appears to the board that said prior board entered into said contract without the advice of an attorney, and this board being advised by the attorneys of the

District that said contract amounted to a disposition of the bonds for the sum of eighty per cent. of the par value of said bonds, and that said bonds were disposed of by said prior board without any consideration, and that certain other bonds were disposed of for a consideration, but that no record whatever was made by the district of the disposition made of said bonds, so that the district is without any means of determining which bonds were disposed of for a consideration and which bonds were disposed of without a consideration, leaving this board of directors absolutely without information as to which bonds of said issue were disposed of without a consideration and which bonds were disposed of for a consideration, and the board, after a careful inquiry and investigation to obtain same has failed to obtain such information.

“And, whereas, it appears to the board that certain bonds were disposed of without a consideration, and it further appears that a suit has been commenced against the Emmett Irrigation District in the District Court of the United States for the District of Idaho, Southern Division, by A. N. Gaebler, for the payment of certain coupons and certain bonds of the District, and that the records of the Emmett Irrigation District are public records, open to the inspection of the public, and that the Emmett Irrigation District is a public corporation, and any person dealing with it is permitted to go to the records

of the district, and that if any purchaser of its bonds had gone to the records of the district he would have found that said bonds were disposed of without any record. And, whereas, this board of directors has not paid any interest coupons upon any bonds of the district from any assessment levied for the payment of interest on the bonds of the district, and has refused and now refuses, to pay any such coupons, until the court shall have determined the liability of said district upon said bonds, and further to determine which bonds were legally disposed of and which bonds were not legally disposed of.

“Now, therefore, be it resolved that the board of directors, upon the advice of the attorneys of the district, will not levy any assessment to pay the coupons of any bonds of the district, until the court shall have determined the liability of the district. That this board do now adjourn without levying any assessment for the payment of interest upon the bonds of the Emmett Irrigation District.

“A vote was taken, which resulted as follows: Aye, W. H. Shane, N. B. Barnes, E. J. Reynolds. Whereupon the president declared the resolution adopted.”

Similar action was taken in 1915, and no action in 1916.

W. H. SHANE, was called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HAGA.

I am W. H. Shane and have resided at Emmett for the last nine years and a land owner in the defendant district. Am a director and chairman of the board of directors of said district. I have been chairman four years. Had been director about a year and a half prior to that. There are some delinquencies in both interest and maintenance taxes in the district.

The deposition of J. EVERTON RAMSEY, heretofore taken, pursuant to stipulation of the respective parties plaintiff and defendant, as a witness in behalf of plaintiffs, was then read by counsel for plaintiffs. The said J. Everton Ramsey, being first duly sworn, testified in said deposition as follows:

DIRECT EXAMINATION.

I am J. Everton Ramsey, reside at Swarthmore, Pa.; am treasurer of Lincoln University and have been for thirty years or more. Lincoln University has been a corporation for more than 50 years. It acquired 10 bonds of the Emmett Irrigation District in denominations of \$500 each and numbered D583 to D592, inclusive, aggregating \$5,000.00, and all unpaid interest coupons thereon, for which it paid value, and still own same. An inquiry was made as to the legality. I had furnished me the legal opinion of Messrs. Adams & Candee of Chicago, and understood, also, that the Supreme Court of the State of Idaho had passed favorably upon the bonds, and assumed that the statements contained in the bonds as to their legality were true.

CROSS EXAMINATION.

Lincoln University acquired the bonds July 11, 1912, from Corkill & Company, Brokers, Chicago, Illinois, and paid the purchase price in full on that day. Ninety-two and one-half and interest was paid as purchase price. The price seemed to me about right for this class of security. I bought about this time a number of other irrigation district bonds and all of them at a discount from par. Some as low as 90. The consideration was in cash in the sum of \$4,631.66. No part of the consideration was obligations of the Canyon Canal Company. I, personally, conducted the purchase and knew nothing of the terms and conditions upon which the bonds were delivered by the District to the Fort Dearborn Trust and Savings Bank of Chicago. I had communicated with Corkill & Company with reference to the bonds. It was a letter dated May 29th, 1912. The letter is the same letter set forth in the foregoing testimony of J. Everton Ramsey, as President of the Chester County Trust Company.

The deposition of J. Everton Ramsey, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness in behalf of plaintiffs, was then read by counsel for plaintiffs, and the said J. Everton Ramsey, being first duly sworn, testified in said deposition as follows:

DIRECT EXAMINATION.

I am J. Everton Ramsey, and reside at Swarthmore, Pennsylvania. I have been president of the Chester County Trust Company, West Chester, Pa.,

some eight years. Chester County Trust Company is a corporation, incorporated in 1900.

The Chester County Trust Company acquired twenty bonds of the Emmett Irrigation District, in denominations of \$500, and numbered D569 to D578, inclusive, and D717 to D726, inclusive, aggregating \$10,000, and all unpaid interest coupons thereon. It paid value therefor and still owns the same.

Inquiry was made prior to acquisition of the bonds as to their legality. I had furnished me the legal opinion of Messrs. Adams & Candee of Chicago, and understood also that the Supreme Court of the State of Idaho had passed favorably on the bonds, and assumed that the statements contained in the bonds as to their legality was correct.

CROSS EXAMINATION.

The bonds were acquired July 3d, 1912, from Cor-kill & Company, brokers, Chicago, Illinois, and the purchase price paid July 3d, 1912, in full. The consideration given was ninety-three and one-half and interest. The price seemed to me about right for this class of security. I bought about this time a number of other irrigation bonds, and all of them at a discount from par. Some as low as ninety. At the same time I sold to Corkill & Company \$10,000 Idaho-Oregon Light & Power Company 6s at par and interest.

The consideration did not consist in whole or in part of the obligations of the Canyon Canal Company. I, personally, conducted the purchase. I first saw the bonds at the time of purchase and knew nothing of the terms and conditions upon which the

bonds were delivered by the Emmett Irrigation District to the Fort Dearborn Trust and Savings Bank of Chicago.

I had the following communication from Corkill & Company with reference to the bonds at or about the time the date the same bears:

"CORKILL & CO.
112 So. LaSalle St.,
Chicago.

May 29, 1912.

"J. Everton Ramsey, Esq.,
President, Chester County Trust Company,
West Chester, Pa.

"Dear Sir:

We beg to acknowledge your valued favor of the 27th inst., in reference to the Emmett Municipal 6% bonds. The Rand McNally Directory evidently gives the census of 1900. The population is given locally by the banks as between 2500 and 3000. The town has four school districts and one high school and had 981 children attending the first day of May, 1912. You can readily see that the figures of 1351 is entirely out of proportion. 2800 is accepted as a conservative figure and anyone visiting the town will readily see that the population at least reaches that figure.

"Regarding Idaho-Oregon L. & P. bonds; you have been misinformed as to the likelihood of the bonds being called at 105 in the near future. They cannot be called until after April 1st, 1915. We consider the bonds good although the market for

them has been somewhat unsatisfactory, the company not being properly financed at the beginning. Recently some parties secured a power site near Emmett and threatened competition with the Idaho-Oregon people. This has killed the market for the bonds temporarily. We think, however, they will prove to be a good investment and inasmuch as we have sold a large amount of them, are willing to take a limited quantity in trade for our new issue. We thought the price of 101 was quite liberal, especially in view of the fact that your folks only paid 90.

"We are enclosing you herewith a copy of the legal opinion. The Engineering report is encumbered with a great many engineering descriptions of no interest to the bondholder. We intend to have a digest report made and printed as soon as Mr. Rosecrane of the Rosecrane Engineering Company is in town, and will send you a copy.

"If you will make an immediate exchange of the \$13,000 Idaho-Oregon 6s for Emmett Municipal 6s we would be willing to extend the price for the Idaho-Oregon to 102. This price however, will not hold indefinitely as the market for the bonds is gradually declining, not because of any depreciation in value of the property but principally for the reason outlined above, competition.

"Awaiting the favor of an early reply, I am,

Very truly yours,

Corkill & Co."

The deposition of FRANK W. HORTON, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness in behalf of plaintiff, was then read by counsel for plaintiffs, and the said Frank W. Horton, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am Frank W. Horton, aged 51 years, residing at San Diego, California. I have no occupation at present. I am a citizen of the State of California and I purchased five bonds of the Emmett Irrigation District, numbered M138 to M142, inclusive, each of the denomination of \$1,000.00 and paid value for the same, and still own the bonds. Before I bought them I consulted with George B. Caldwell, Vice-president of the Continental Trust and Savings Bank of Chicago, in charge of their bond department, whom I considered a very good authority on bonds, and he showed me an opinion of Adams & Candee, attorneys in Chicago, who had approved the bonds and certified that they were the legal obligations of the District. Mr. Caldwell said he thought they were all right. From this and statements contained in the bonds themselves I concluded that the bonds were perfectly good and purchased them of the Fort Dearborn Trust and Savings Company, in person.

CROSS EXAMINATION.

I acquired them in 1911 or 1912, from the Fort Dearborn Trust Company, and gave in exchange for the five bonds bonds in 1911 or 1912. The consideration was not money, but \$5,000.00 par value of the

Canyon Canal Company bonds. I do not know the exact valuation of the Canyon Canal bonds at the time I made the exchange. I had previously paid \$5,000 cash for them. They were first mortgage bonds. I do not remember their dates or dates of maturity. I personally conducted the purchase and saw them for the first time at the Fort Dearborn Trust Company, where they were purchased. I knew nothing of the terms and conditions upon which the District bonds had been delivered to the Fort Dearborn Trust Company. They informed me it was the direct obligation of the District and I would receive par and accrued interest in trade for my bonds. I had no communication with Corkill or Corkill & Company with regard to the bonds prior to the date of purchase.

The deposition of S. Ralston Dickey, heretofore taken, pursuant to stipulation of the respective parties plaintiff and defendant, as a witness in behalf of plaintiff, was then read by counsel for plaintiffs, and the said

S. RALSTON DICKEY, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am S. Ralston Dickey and reside at Oxford, Pa., of the age of 66 years and president for the last 30 years or more of the National Bank of Oxford, which was organized under the laws of the United States January 4, 1865.

The National Bank of Oxford purchased 20 bonds of the Emmett Irrigation District, numbers D559

to D568, D707 to D716, aggregating \$10,000.00 and all unpaid interest coupons thereon. It paid value therefor and still owns the same. An investigation was made as to the legality. I had furnished me the legal opinion of Messrs. Adams & Candee of Chicago, and understood, also, that the Supreme Court of the State of Idaho had passed favorably upon the bonds, and assumed that the statement contained in the bonds, as to their legality, were true.

CROSS EXAMINATION.

The bonds were acquired July 5, 1912, from Corkill & Company, Brokers, Chicago, Illinois, and payment made at that time in full. Ninety-three and a half and interest was given for the bonds. The price seemed to me about right for this class of security. I bought about this time a number of other Irrigation District bonds, and all of them at a discount from par. Some as low as ninety. The consideration was other than money. We gave in exchange \$10,000.00 in value Idaho-Oregon Light & Power and Ref. 6s. None of the consideration was obligations of the Canyon Canal Company. I conducted the purchase in connection with our vice-president J. Everton Ramsey, and knew nothing of the terms and conditions upon which the bonds were delivered by the District to the Fort Dearborn Trust & Savings Bank of Chicago. I had a communication from Corkill & Company with reference to the matter. The communication referred to was a letter dated May 29, 1912, from Corkill & Company to J. Everton Ramsey, President Chester County Trust Company.

Same identical letter set forth as a part of the testimony of said J. Everton Ramsey.

The deposition of Mary C. Waddell, heretofore taken, pursuant to stipulation of the respective parties plaintiff and defendant, as a witness in behalf of plaintiff, was then read by counsel for plaintiffs.

The said MARY C. WADDELL, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am Mary C. Waddell, aged 61, a citizen and resident of Albany, New York, and have no occupation. I acquired a bond of the Emmett Irrigation District of the par value of \$1,000.00, numbered M228, for which I gave in exchange one bond of the Canyon Canal Company of the value of \$1,000.00. I still own the District bond. I never made any inquiry or investigation as to the legality of the District bond.

CROSS EXAMINATION.

I acquired my bond during the month of October, 1911, from Trowbridge & Niver Company of Chicago, Ill., delivery being made through Fort Dearborn Trust & Savings Bank. I have no knowledge of the Canyon Canal Company bond surrendered. I paid \$980.00 for it in March, 1906. The Canyon Canal bond was due in 1914. I cannot state the date of issue. I made the exchange personally.

The deposition of Charlotte H. Shipman, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness on behalf of plaintiffs, was read by counsel for plaintiffs.

The said CHARLOTTE H. SHIPMAN, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am Charlotte H. Shipman, aged 54 years, reside at Indianola, Iowa, formerly Hastings, Iowa, and a citizen of the State of Iowa, and by occupation a housewife. At the time of the death of my father, Joshua Manners, who was the owner of two thousand dollar bonds of the Emmett Irrigation District, I acquired one of the same by inheritance, the same being M224, which I still own. I took it at its face value as a part of my share in the settlement of the estate. I understood that the said bond was worth its full face value and that all proceedings were legal, and understood that the said bond was in all particulars legally issued, and that my father had in his life time paid full value therefor.

CROSS EXAMINATION.

My father died July 3, 1913, and I got the bond about December, 1913. No part of the consideration given for the bond was obligations of the Canyon Canal Company. I know nothing of the terms and conditions upon which the bond was delivered by the District to the Fort Dearborn Trust and Savings Bank. I have never had any communication with Corkill or Corkill & Company.

The deposition of Sanford H. Hudson, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness on behalf of plaintiffs, was read by counsel for plaintiffs.

The said SANFORD H. HUDSON, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am Sanford H. Hudson, aged 58, a citizen and resident of Benson, Minnesota, by occupation a lawyer. I acquired six bonds of the Emmett Irrigation District, of the par value of \$4,000.00, four of which are of the par value of \$500.00 each and numbered D179, D849, D1031 and D1492, and two of the denominations of \$1,000.00 each, numbered M124 and M125, for all of which I paid value and am still the owner. I was familiar with the District through having formerly owned \$5,500.00 par value of Canyon Canal Company bonds, which were taken care of at maturity, except \$1,500.00, which were exchanged for District bonds, on representation that their legality had been established by the Supreme Court of the State of Idaho, and that all proceedings of the District prior to the issue of the same were regular. I also received a copy of a legal opinion of Attorneys in Chicago, whom I knew by reputation and in whose judgment I had confidence, to the effect that these bonds were legally and properly issued. I also received a book of views of the farms and homes included in the district and all of the above representations I believed to be true at the time I acquired said bonds.

CROSS EXAMINATION.

I acquired two of the bonds, aggregating \$1500.00, through Corkill & Company, April 10, 1912, and 4

bonds, aggregating \$2500.00, October 1st, 1912, from G. S. Spear of Chicago. All of which were paid for at the time of purchase. The consideration given was bonds of the Canyon Canal Company of the par value of \$1500.00, and the bonds of the Mississippi Land & Lumber Company of the value of \$2500.00. The valuation of the bonds exchanged was \$4000.00. The Canyon Canal Company bonds were dated June 15th, 1905, due July 1st, 1913. I had no knowledge of the terms and conditions on which the bonds were delivered to the Fort Dearborn Trust and Savings Bank, nor to whom delivered, except as stated in the bonds themselves. I had correspondence with Corkill & Company of Chicago, who first called my attention to the organization of the Canyon Canal system by a printed circular addressed to the bondholders and soliciting the exchange of canal bonds for district bonds, but I cannot now produce copies thereof.

The deposition of Helen M. Conrad, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness on behalf of plaintiffs, was read by counsel for plaintiffs.

The said HELEN M. CONRAD, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am Helen M. Conrad, aged 70, residing at and a citizen of Ann Arbor, Michigan, by occupation housekeeper. I acquired four bonds of the Emmett Irrigation District, numbered D90, D91, D144 and D145 of the denomination of \$500.00 each, for which I

paid full value, and still own the same. I made investigation of the legality of the bonds. Mr. Hale, agent of Corkill & Company, called on me, and another agent from the same company. Both of them urged me to take these bonds and assured me of their legality, stating that the bonds had been approved by the Supreme Court of the State of Idaho, and that all proceedings of the District were regular. A legal opinion was also furnished by Adams, Candee, Steere & Hawley of Chicago. In the original circular, issued by Corkill & Company, it was stated that the bond and the proceedings had been confirmed by the Supreme Court of the State of Idaho.

CROSS EXAMINATION.

I acquired the bonds the latter part of November, 1912, from Corkill & Company, and paid for same about November 28th, 1912. I gave in exchange Marysville Canal & Improvement Company bonds, which were valued at \$2000.00, plus accrued interest. I gave no obligations of the Canyon Canal Company. I first saw the bonds at the time I paid for them. I knew nothing about any arrangement between the District and the Fort Dearborn Trust and Savings Bank. My communications for all were with J. J. Corkill & Company.

The deposition of J. Willis Gardner, heretofore taken pursuant to stipulation of the respective parties plaintiff and defendant, as a witness on behalf of plaintiffs, was read by counsel for plaintiffs.

The said J. WILLIS GARDNER, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am J. Willis Gardner, aged 53, a citizen and resident of Quincy, Illinois. I acquired the following bonds of the Emmett Irrigation District: Bonds numbered M88, M89 and M112, each of the denomination of \$1000.00, and bonds numbered D547 to D550, inclusive, and D691 to D694, inclusive, each of the denomination of \$500.00, for all of which I paid value and still own. Prior to acquiring same I was informed that they had been approved by the Supreme Court of the State of Idaho and that all proceedings were legal. I read the bonds or a copy thereof and also the opinion of Adams & Candee, who approved them.

CROSS EXAMINATION.

I acquired them in 1912 through J. J. Corkill & Company. The purchase price was paid in 1912, not in installments, and consisted of Canyon Canal Company bonds of the par value of \$7,000.00. I do not know the exact market value of the latter at the time of the exchange, but I paid 95 for them. The Canyon Canal Company bonds were secured by a first mortgage on the property of the Canal company, dated June, 1905, and the maturity was 1922. I saw the District bonds a short time prior to purchasing them. I did not know the terms and conditions upon which they were delivered by the District to the Fort Dearborn Trust and Savings Bank. I had some communication with J. J. Corkill & Company, orally, at their Chicago office.

Whereupon, Mr. Haga, of counsel for plaintiffs,

stated that he had prepared a copy of the bond No. 298, which was thereupon marked Plaintiffs' Exhibit No. 2 for identification, and which he explained contained only a copy of one coupon, being the coupon due on January 2nd, 1924, but said all coupons are the same except as to date and maturity, which he requested be substituted for the said bond 298; and it was admitted by counsel for defendants that the coupon attached to copy was the same as other coupons, except as to the date of maturity. Whereupon, the said copy was substituted for bond No. 298.

Whereupon, W. H. SHANE, a witness previously sworn and examined, was recalled on behalf of plaintiffs, and testified as follows:

The defendant has operated and used, since the spring of 1912, the irrigation system referred to in the contract between the District and Corkill, dated September 12, 1911. The releases of the mortgages, trust deeds, issued by Canyon Canal Company, securing the obligations of that company to be taken up and exchanged or surrendered for district bonds under the contract were turned over, as I understand, to the depository, but have not been furnished to the district. No attempt has been made to enforce any of them since the spring of 1912, as far as I know; nor has the district been disturbed in possession or enjoyment of the irrigation system. Mr. Glenney said he had a release of the Trowbridge & Niver claim, referred to in the contract, but I have never seen it.

CROSS EXAMINATION BY MR. DRISCOLL:

The District has operated and used the canal system since a year before 1912. They owned the system at the time the original contract of September, 1911, was made and were operating and using it at that time. The obligations of the Canyon Canal Company, to which I have referred in my direct examination, were water contracts—first mortgage bonds and water contracts. They were contracts between the settlers and the Canyon Canal Company and were obligations signed by the various land owners in the district to the Canal Company for purchasing water. The Trowbridge and Niver claim was for money that they claimed they had spent in remodeling and rebuilding the irrigation system, over and above the \$600,000 indebtedness that was supposed to be against it. It purported to be an indebtedness on the canal company to Trowbridge & Niver for that purpose.

Whereupon, Mr. Haga stated that it was not only an indebtedness of the Canyon Canal, but that Trowbridge & Niver claimed by virtue of the Carey Act they had a lien against the system, because the system cost more than the water contracts which they already had.

Whereupon, it was stipulated by counsel that the Canyon Canal Company was a construction company under the Carey Act, and the Emmett Bench Canal Company was the settlers' holding company under the same Act.

RE-DIRECT EXAMINATION BY MR. HAGA:

The District has not been harrassed or threatened with any foreclosures of the mortgages given by the Canyon Canal Company on the canal system. As far as I know, these old mortgages and the bonds they secured have been released. As to the amount of the Trowbridge & Niver claim to be released under the contract, I only know what Corkill & Company said it was, which I believe was \$450,000.00.

ADOLPH N. GAEBLER, called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HAGA:

I am Adolph N. Gaebler, residing at St. Louis, Missouri, a citizen of said State. Also a plaintiff in this action and the owner of bonds of defendant District, in an amount par value of \$47,500. The numbers of my bonds is correctly stated in the amendment to the bill of complaint. I am the owner of all the unpaid coupons belonging to these bonds. I bought twenty thousand dollars of the bonds August 1st, 1912, for \$16,500.00, cash, which was at the rate of eighty-two and a half cents; and the remainder, \$27,500.00, on June 24th, 1913, for which I exchanged bonds and received cash, to-wit: I received \$27,500.00 worth of defendant district bonds and \$837.50 in cash for \$10,000.00 Twin Falls North Side Land and Water Company sixes, and \$10,000.00 Twin Falls Oakley Land and Water Company sixes, and \$7,500.00 Twin Falls Salmon River Land and

Water Company sixes, for all of which I had paid par, and considered them worth what I had paid for them.

CROSS EXAMINATION BY MR. WOOD:

I don't know what the market value of the Twin Falls bonds exchanged was at the time of the exchange. I bought them a year or two before the exchange.

All the first purchase in District bonds were in five hundred dollar denominations.

The following are the numbers of the last purchase, of \$27,500.00, to-wit:

"Bond numbered D345, D346, D347, D348, D298, D349, D350, D351, D352, D353, D383, D384, D385, D386, D387, D493, D494, D495, D496, D497, D598, D637, D638, D639, D640, D641, D642, D643, D789, D790, D791, D792, D793, D794 to D800, inclusive, D850 to D855, inclusive, D1055 to D1058, inclusive, D1300 to D1304, inclusive."

I purchased the first lot of \$20,000 of Corkill & Company and delivery was made at St. Louis. I am the owner of a tract of land in the defendant district, and was led to buy after my friend, Col. Hunter, referred me to these bonds, saying, as long as I was the owner of a piece of land at Emmett I ought to own some of the bonds. He said they were perfectly legal and valid and for that reason I bought them. I was at Emmett when Col. Hunter made the representation. I knew the office of the district was in Emmett at the time but made no investigation there as to the record in any way involving this bond issue.

I did not know that Corkill & Company were handling the bonds nor acting as brokers for the bonds. I do not remember a conversation had in the Bank of Emmett before I purchased the bonds in the presence of Mr. Hunter and Mr. Shane, when Mr. Shane said to Mr. Hunter in my presence to be sure that Dr. Gaebler got his bonds he was going to purchase from Corkill from the Fort Dearborn Trust & Savings Bank, because that was the only way by which the District would get any money out of the purchase. No such conversation took place, I never saw Mr. Shane until yesterday. Mr. Shane did not further in that conversation in my presence state that if I got the bonds from Corkill I would be purchasing his bonds, which were contested and objected to as commission bonds, and the district would get no money to further improve the canal. Mr. Shane did not substantially repeat the same statement to Col. Hunter in my presence on the same day at Emmett, when I was about to start for Boise. No such conversation took place. I was at Emmett a few days before I received the bonds. I was notified my bid was accepted when I got back to St. Louis. I gave the bid to Colonel Hunter at Emmett and Corkill & Company notified me the bid was accepted. The bid was eighty-two and a half. I didn't know where the bonds were being purchased and didn't care. Colonel Hunter told me there was a matter between the District and some of its underwriters with regard to the contract, and he told me that wouldn't affect them at all. I wouldn't have bought them if I thought

there was a cloud upon them. I made no further investigations as to the statements of Colonel Hunter. I did not know Corkill & Company existed until after I got the bonds. The bonds were shipped from Corkill & Company. I got the second lot of bonds from Corkill & Company. I did not know anything more about a controversy between Corkill and the District at this time than I did when I bought the first lot. The interest coupons were paid, I thought by the District. I made no investigation. The second transaction was made exclusively with Corkill & Company. I didn't know that a District could only sell its bonds for cash. I didn't care or think it was necessary to inquire. Colonel Hunter is dead. The second purchase was made in St. Louis from a representative of Corkill & Company who came to my office and made the offer to exchange Emmett bonds for the Twin Falls bonds.

RE-DIRECT EXAMINATION BY MR. HAGA:

I have been in Emmett about four times and stayed two or three days each trip and got very little acquainted.

RE-CROSS EXAMINATION BY MR. WOOD:

I don't know whose bonds I purchased at either time.

I expected Colonel Hunter to buy the bonds in the open market or where he could get them if he found anyone who wanted to sell them at my figure.

Whereupon, counsel for plaintiffs offered in evidence Plaintiffs' Exhibit No. 3, being the judgment

roll in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, in the matter of the confirmation of the assessment of benefits of the Emmett Irrigation District, and the same was admitted in evidence over defendants' objection and thereupon leave to substitute a copy for the original was given. From said judgment roll it appeared that the said District, through its Board of Directors, had determined the benefits which would accrue to each tract or subdivision of land therein from the purchase and construction of the irrigation works and had apportioned the costs of such works over each tract and subdivision in accordance with the statutes in regard thereto, and that the action of such Board in apportioning such benefits and the costs of such works to the several tracts of land in said District was duly approved and confirmed by said Court on the 11th day of June, 1913, and no appeal was taken therefrom and such decree has become final.

EDMOND SEYMOUR, being called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows, to-wit:

I am Edmond Seymour and reside in and a citizen of New York, State of New York, by occupation a banker and broker and am engaged in handling municipal and other bonds. I am chairman of the bondholders' protective committee of the defendant District and a member thereof. The other members are Adolph N. Gaebler, J. Paul Thompson, residing in Cleveland, Ohio, and a citizen of that state, and John

R. Morrow, residing in Pittsburg, Pennsylvania, and a citizen of that state. The New York Trust Company of New York City is the depository for the bonds that the Committee looks after, or represents. This suit is brought with the consent of the Committee.

I know J. Overton Ramsey, whose deposition was read here. He is treasurer of the Lincoln University at Oxford, Pennsylvania. Lincoln University is a citizen of the State of Pennsylvania. I should say there are between 250 and 300 bondholders, as near as I can tell, widely scattered. My committee has a record of some, but not all, of the bondholders. The Trust Company has a record which is open for committee inspection. I am advised as to its contents when I ask for it. I have a list of the bonds deposited with the Trust Company. The Trust Company list would show to whom they issued the certificates of deposit for the bonds. I think the committee was organized in July, 1914. I know the attitude of the District toward the payment of the interest and bonds involved in this suit. It has injured the sale of the bonds very much and depreciated their value. The Directors stated to me their purpose to divide the interest fund up and pay it to the original tax payers who paid it in.

CROSS EXAMINATION BY MR. WOOD:

It was Mr. Shane who stated the purpose with reference to the fund, and the remark was made by him about a year ago in the Boise City National Bank

at Boise, in the presence of Mr. Baldwin of New York City, my attorney, Fremont Wood and Mr. Haga, Mr. Thompson and Mr. Little. You, Mr. Wood were representing the board of directors, as attorney, and all the board were present. I remember of you, Mr. Wood, making the statement to the board of directors that these taxes having been paid, there was no power in the district to return the funds to any of the land owners. This whole conversation was at a general meeting of the above named parties with a view to determining upon a compromise between the District and the bondholders. I could have obtained the names of the depositors of bonds with the Trust Company, but made no effort to secure the names.

My deposition was taken in this case in December, 1915, and the attorneys for the defendants called on me at that time for a list of the owners of bonds that were deposited. I refused to furnish it. I could not give it here and made no attempt to secure it. I am acting for the Committee. There was a bondholders' agreement entered into. This paper, defendants exhibit 1, is a copy of that agreement. Mr. Morrow became a member after the committee was formed.

Whereupon, Defendants' Exhibit 1 was offered and admitted in evidence:

Said exhibit being a bondholders' agreement for the deposit of bonds in question in this suit with a Bondholders' Committee, the same being dated October 24, 1914, by and between Edmond Seymour of New York, J. Paul Thompson of Cleveland, Ohio, A.

N. Gaebler of St. Louis and John R. Morrow of Pittsburg, Pa., as parties of the first part and all such holders of the issue of bonds in question in this action as should deposit their bonds under the terms of the agreement, and by which it was provided among other things that the Committee were appointed the agent of the depositors with authority to take any action necessary to protect the depositors' interests; that the holder of bonds should deposit the same with the New York Trust Company of New York, as depositary, to be held subject to the order of the Committee, upon which deposit the depositor should become a party and bound by the agreement, whether he signed it or not, that the bonds and coupons were by agreement assigned and transferred to the Committee, and the depositary should issue a transferable certificate of deposit therefor; that all certificates of deposit should be registered on books kept by the depositary and no transfer valid unless shown on the book. That all bonds and coupons should be subject to the order and control of the Committee, and upon the issuance of certificate of deposit by the depositary the Committee should become and was to be considered as the owner of the bonds deposited, in law and in equity for the purposes of the agreement and of all the rights, title and interest of the original depositors' therein; that the Committee should exercise all the rights of the depositors as holders of the coupons deposited thereunder and in its sole judgment and discretion take all steps deemed necessary by it to protect, guard,

secure and enforce the rights of the depositors in the name of the Committee, or in the name or on behalf of the depositors, or otherwise, and to that end to institute and carry on all such suits and proceedings in equity and law, or otherwise, as it may deem expedient or proper to protect the interests and enforce the rights of the depositors in every respect and to any extent.

That to defray expenses of the Committee, each depositor would, upon demand, pay promptly to the Committee his prorata share of the expense and liability, not exceeding one per cent of the face value of the bonds deposited by him.

The cross examination then continued as follows:

The repudiation of the District depreciated the bonds. The lawsuit and refusal of the District to levy any taxes depreciated them. The mere fact of the failure to pay interest and the mere fact that there was a contest would depreciate them.

The amount of bonds deposited with the New York Trust Company under the Committee agreement is \$728,100. All the bonds held by plaintiffs in this suit are deposited with the Committee among the others.

The Bondholders' Committee assumed the expenses of this suit and it is being prosecuted by them in behalf of all the bondholders whose bonds have been deposited with the New York Trust Company under an agreement. I do not know the whereabouts of the bonds not deposited.

RE-DIRECT EXAMINATION BY MR. HAGA:

An effort was made to get all bondholders to come into the suit, and many objected, especially the banks, as they said it would injure their business, and many individuals objected. Those who are plaintiffs are those who consented. Neither Corkill or Corkill & Company or———Emmons have deposited bonds with the Committee.

Whereupon, Mr. Haga, for plaintiffs, tendered the bonds identified by Dr. Gaebler as being his bonds, for examination by counsel, and offered to produce any other bonds of plaintiffs in the case for similar examination, but further stated that he did not desire to leave the bonds or put them in as exhibits. He also offered in evidence, as plaintiffs' exhibit No. 4, the coupons in suit, being past due, and the same were admitted in evidence, with the understanding that they might be withdrawn for deposit with the depositary, the New York Trust Company, subject to the order of the Court in the future.

Whereupon plaintiffs rested.

Whereupon, the following proceedings were had:

MR. DRISCOLL: May it please the Court, at this time, and prior to entering upon the defense in this action, we wish to call the Court's attention to the fact that we have raised in the answer the question of the defect or want of necessary parties.

After referring to Equity Rule 43, counsel continued:

We desire at this time to move that either the bill

be dismissed, or that the other necessary and indispensable parties be brought in.

(After considerable discussion, the Court remarked as follows:

THE COURT: I think, gentlemen, that I shall deny the motion. I think I shall deny it for the present without prejudice to a renewal after hearing the evidence that may be adduced by the defendants. The situation is somewhat anomalous.

MR. WOOD: The Court, I suppose, means after hearing the evidence upon this question, or does Your Honor refer to the general evidence?

THE COURT: I mean the general evidence. I may say very frankly to counsel at the present time that I am not favorably impressed with the attitude of those who have bonds or control bonds, and apparently at least seek to withhold information as to who the owners or holders are from the Irrigation District. I say that is the apparent attitude. I am not sure that it is their real attitude, but it is difficult to avoid that impression. That, however, I will be able to control ultimately by declining to grant any relief unless the plaintiffs will take an equitable attitude toward the district.

MR. HAGA: May I suggest that in view of what the Court has said about the plaintiffs doing what they can to assist in giving the defendants the information that these witnesses may possess who have declined to testify, that so far as we are concerned, if the defendants desire that evidence, we are very glad to have it produced, and I am satisfied that the

chairman of the committee will have no objection whatever to having the New York Trust Company, which has the only record that we know of, of bondholders that have deposited their bonds, give that information, if we can get it out of the Trust Company without compelling them, as a witness—

THE COURT: I think I must have misunderstood the witness, or you did. Mr. Seymour, did you say that your committee had a list of the holders of these bonds, and their names, in New York?

A. Not a complete list. I have a partial list.

THE COURT: Why is it only partial?

A. Because I haven't had a list from the Trust Company for quite a long while.

THE COURT: You have had a list up to an aggregate of how many bonds?

A. I think I had a list up to about five hundred thousand. I had a list when they had that hearing in New York before; I think I had a list covering that period, up to that date.

The Court: You haven't that list with you?

A. No, sir.

Mr. Haga: I may suggest, Your Honor, that the bonds are not deposited with the committee.

The Court: I understand. But aren't you advised by the Trust Company of the bonds deposited with it?

A. I have been from time to time, but I haven't latterly, because I haven't asked for it. Sometimes I go over there and they say, "We have some bonds additional deposited."

On re-direct examination by Mr. Haga, Mr. Seymour testified as follows: I received a list from the Trust Company the other day since I arrived here of additional bonds deposited without giving the names of the depositors, but simply stating the amount of the bonds and the numbers and denominations. That is the way the information is usually given.

The Court then inquired of Mr. Seymour: How do these bonds get into the hands of the Trust Company? How do bondholders know that there is any such plan on foot as you have?

A. We advertised, and then we sent out circulars to everybody we ever heard of. Corkill furnished us a list of addresses, and the first circular gotten out, he mailed it out. He was very reluctant to give us the list—I don't know why—but he mailed them out, and as they began to come in I found out who they were. I had a great deal of correspondence, I had a large correspondence, I had letters almost every day from bondholders, inquiring about these, and in that way I learned something about it.

Mr. Haga: Your Honor understands that with a bond house, its capital in trade is a list of the customers that buy bonds, and that is the last thing they will give up. That is the good will they have to sell.

Mr. Wood: This witness has already testified that he has a list in New York of the names of at least the holders of five hundred thousand of these bonds, and that he could get the balance from the Trust Company, and that he hasn't got it because he hasn't called for it.

The Court: Now what steps do you suggest? If you want this information, what steps do you suggest that they take to get it for you. Counsel has indicated that they would be willing—

Mr. Driscoll: To bring in the additional parties, would be our answer to that.

The Court: Well, of course, I know that is what you want, but I am not sure that you will get that. Suppose it was half a loaf, what half do you want?

Mr. Wood: Of course, if they are not brought in as additional parties, if we could get the names and locations we might proceed in aid of our defense to take their depositions or make them parties ourselves.

The Court: If you want their names, I don't know but that I shall order that they be given you, but counsel can very well see the attitude I have taken in the matter, that is, I feel that if it be true, as seems to be the case, if the district is without information as to where these bonds are, by reason of the failure of its officers to keep proper records, it is only fair that the information be given, and I am inclined to think that plaintiffs possess this information, and if they decline to give it, it would be regarded as inequitable conduct on their part, which would make the court slow in granting equitable relief. Counsel suggests that in view of that, he would try to get this information for you, if you want it. I am rather disinclined to grant your motion if you can be protected in any other way, and so far as I now see, if you have the names of all

the present holders of bonds, it will protect you about as well as to bring them in, and there are grave difficulties in the way of bringing them in.

After further discussion between court and counsel, the court stated:

Before adjourning, though, Judge Wood, I suggest that if you want the names of the holders of these bonds you would better say so to counsel, and see what steps will be taken to get them for you.

Mr. Wood: I will consider that matter and present the matter tomorrow morning.

The said defendants, by their counsel, in support of the issues on their part, then read in evidence the following portion of the deposition of Edmund Seymour taken in New York City, Dec. 14, 1915.

Questions by Mr. Wood.

Q. Has your committee, Mr. Seymour, any record of the names of the depositors of these bonds and of the description of the bonds so deposited by them?

A. They have a record of the amounts deposited, and the names of the depositors; no other description.

Q. No description involving the denomination of these bonds?

A. No.

Q. Or their dates of maturity?

A. No.

Q. You have a record containing the names of the depositors and the amounts deposited?

A. I have it.

Q. Can you produce it, and will you produce it and furnish us with a list of the names of the depositors and the amounts so deposited.

A. I would prefer not to do that, for the reason that I would want to obtain the consent of the Trust Company and of the depositor; I would be perfectly willing to do it otherwise. I consider that I hold these in trust.

Mr. Wood: I think we will have to insist upon the production of this evidence in possession of the committee.

Mr. Haga: What evidence have you in mind?

Mr. Wood: I am referring to the list—

Mr. Haga: Of the depositors?

Mr. Wood: Of the depositors and the amounts deposited by each. What we would like to get is the denomination, that can't be given. If you had some other witness I would be willing to rely on that witness, but I do not want this witness to leave the stand without—

Mr. Haga: I understand you are making a demand for the record?

Mr. Wood: Yes, making a demand for the record.

Mr. Haga: We can take it up when we get back, because of the ruling of the court we will try and arrange some short cut way of getting the record, either by taking the deposition of some one connected with the depositary, or Mr. Seymour by interrogatories.

Mr. Hawley: Or by stipulation.

Mr. Wood: The only thing is, it may delay matters. When we get this information we may require some time. I do not want to be placed in a position hereafter that any steps we take on account of not getting the information here to subject ourselves to delay hereafter.

Mr. Haga: No. As the case now stands we view it as entirely immaterial, but by a change, by adding additional parties or by the committee coming into the case, if we elect to do that, it may become more or less important.

Q. And for that reason you decline to produce the lists, or furnish us the evidence as to the names of these depositors and the amount of bonds owned by them?

A. That is the reason.

HARRY S. WORTHMAN, a witness previously sworn and examined in behalf of the plaintiff, was called in behalf of the defendants, and testified as follows:

I have resided at Emmett 11 years, in the Emmett Irrigation District, and was secretary from the time of organization to January 2, 1912.

Construction began on the canal system now owned by the defendant district in 1904 or 1905. It was constructed by a company known as the Canyon Canal Company, which was a Carey Act construction company under the Carey Act. The lands were lands of the United States segregated under the Carey Act. The construction was done under contract with the State of Idaho. Water rights were

sold to land owners under the canal, by the Canyon Canal Company, which was the construction company. They had to have a water right before they could file on the Carey Act land. There were quite a large amount of State School lands in the District, between six and seven thousand acres. Contracts for water rights were also made with the holders of these lands. At that time there were about eighteen or nineteen thousand acres in all, State, private and Carey Act lands in the entire selection. And about four thousand acres were added after the construction began, under what was known as the South Side Extension. When the canal was in operation by the Canyon Canal Company, the acreage of water rights sold was in all about 22,000 acres.

Whereupon, counsel for defendants asked said witness to state if he knew the capacity of said canal in comparison with the total volume of waters sold by the Canyon Canal Company. To which counsel for plaintiff objected, as irrelevant and immaterial and not the best evidence. Which said objection was sustained. To which ruling counsel for defendants then and there excepted, which said exception was allowed.

Counsel for defendants then asked said witness to state what he knew about the service involving the delivery of water of the Canyon Canal Company to the users of water under the canal prior to the time of taking over the property by the holding company. Which was objected to by counsel for plaintiffs, on the same grounds as the preceding question.

Counsel for defendant stated the purpose of the question was to show perhaps not a total failure, but nearly a total failure of ability by the Canyon Canal Company to furnish water to the land owners under the canal, under said water contracts. To which counsel for plaintiffs made the same objection. Both of which said objections were sustained. To which said ruling counsel for defendants thereupon excepted, which said exception was by the court allowed.

I signed the bonds as Secretary, beginning about the middle of December, and ending before the 2nd day of January, 1912. Mr. Bell signed as president, beginning about the same time and concluding about four of five days to a week afterwards.

Mr. Shane succeeded Mr. Bell as director. R. B. Wilson succeeded him as President. Whereupon the following portion of the minutes of the board of directors of the Emmett Irrigation District under date of December 2nd, 1911, was read in evidence:

“Special meeting of the board of directors of the Emmett Irrigation District, held at the office of the District at Emmett, Idaho, on the 22nd day of December, 1911, at three o’clock P. M. of said day. Present. R. B. Wilson, W. H. Shane and C. L. Spaulding.”

“Moved and seconded that R. B. Wilson act as temporary president.”

V. T. CRAIG, called as a witness in behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WOOD

I am V. T. Craig, reside at Emmett, Idaho, and am and have been cashier of the Bank of Emmett for the last ten years.

I have made a computation of the amount of bonds maturing at sixteen years and those at twenty years, as shown by the statement on the bond, plaintiffs' Exhibit 2. Plaintiffs' Exhibit 2 states as to the maturity of the sixteen year bonds, "110,000 \$110,000 in amount, being bonds numbered from M43 to M57 inclusive, and from D657 to D826 inclusive, on January 1, 1927." The total amount, according to this statement, maturing in sixteen years, is \$100,000, instead of \$110,000, as stated in the bond.

As to the bonds maturing in twenty years, Plaintiffs' Exhibit 2, states as follows:

\$176,000 in amount, being bonds numbered from M193 to M262 inclusive, and from D1415 to D1646 inclusive, on January 1, 1931." According to this statement the total bonds maturing at the end of twenty year period, on January 1, 1931, is \$186,000, or ten thousand dollars more than stated in the bonds.

CROSS EXAMINATION BY MR. HAGA

In the sixteen year bonds there should have been ten thousand dollars more of bonds. The bonds specified by number as maturing at the sixteen year period are ten thousand short of what the bond recites as the amount. In other words, going by the number or description of the bonds, there are only \$100,000 of bonds maturing in that year, when

there should be \$110,000 then, and in the twenty year bonds, there should be \$176,000 actually maturing, according to the description or numbers of the bonds, and \$186,000 purport to mature at that time.

I have not examined the bonds themselves to determine whether one hundred and ten thousand are made to mature in the sixteenth year or only one hundred thousand, nor whether one hundred eighty-six thousand of them mature in the twentieth year or only one hundred seventy-six thousand. So I do not know how many bonds actually mature in the sixteenth year or in the twentieth year.

RE-DIRECT EXAMINATION BY MR. WOOD

I had these bonds in my possession in the bank, both before and after they were signed by the officers. They were signed by Mr. Bell, as President, between the 15th day of December and some time after the 1st of January, 1912. Two or three days afterwards, I think. I don't know how many were signed after the 1st of January. All were signed in our bank room. They had been signed by the Secretary before the president signed them.

W. S. SHANE, a witness previously sworn and examined in behalf of plaintiffs, was recalled as a witness in behalf of the defendants, and testified as follows:

DIRECT EXAMINATION BY MR. WOOD

I began to act as director of the district December 22, 1911, and continued to act from that time.

Mr. Bell finished signing the bonds as president on the 3d or 4th of January.

I know Dr. A. N. Gaebler, one of the plaintiffs. Met him in July or August, 1912, at the Bank of Emmett, in Emmett, Idaho, and there had a conversation with him with reference to the purchase of the bonds of the District. At that time Colonel Hunter came to me and said Dr. Gaebler was in town with him and expected to take \$20,000 in district bonds. He took me down and introduced me to Mr. Gaebler, and I told him that I understood he was figuring on buying some bonds. He said he was. I asked him to be careful about the bonds he took. That Mr. Corkill had bonds that we questioned very much, that he called his own, and if he took the bonds from Mr. Corkill we would not get any money for them, but if he took the bonds out of the depositary the money would come to the District. I was talking to Dr. and Mr. Hunter together. The doctor said he would leave that to Mr. Hunter. Mr. Hunter said he would take care of that. But there was no money came. Subsequent to the conversation in the bank, I went with them out to the automobile standing across the street and said, now whatever you do don't let Doctor here take any bonds except the bonds out of the depositary, and the Doctor said "I will leave that all with the Colonel," and the Colonel said, "I will see that he does not." This was before the first purchase of bonds by Dr. Gaebler. It was in July or August during that summer, 1912.

RE-CROSS EXAMINATION BY MR. HAGA

I remember on last Monday Mr. Seymour introduced Dr. Gaebler to me in this room. I did not say in substance or effect I had not met the Doctor before. I simply shook hands with him. I was satisfied he had forgotten me. I knew him when I saw him.

HARRY S. WORTHMAN, a witness heretofore examined in behalf of defendants, was again recalled in behalf of defendants and testified as follows:

The Emmett Irrigation District took possession of the canal system formerly owned by the Canyon Canal Company August 15, 1911, and has operated it since that time. This paper, defendants' Exhibit No. 2, was in my possession on that day as a director and secretary of the Emmett Bench Canal Company and also as secretary of the Emmett Irrigation District. This paper, defendants' Exhibit No. 3 for identification, I first saw before it was executed, probably three or four days prior to the 15th day of August, 1911, and, as secretary of the Emmett Irrigation District, have had it in my possession. The canal property is described in both, defendants' Exhibit No. 2 and No. 3, is the same property originally constructed by the Canyon Canal under the contract with the State of Idaho and now operated by the Emmett Irrigation District.

The District went into possession of the property under the instrument marked Defendants' No. 3. Said defendants' Exhibits No. 2 and No. 3 for iden-

tification were then offered and admitted in evidence.

Exhibit No. 2 was a quit claim deed, made, executed and delivered by the Canyon Canal Company, Limited, to the Emmett Bench Canal Company, as grantee, under date of August 15th, 1911, conveying from the said Canyon Canal Company to said Emmett Bench Canal Company all right, title and interest in and to the irrigation system, rights of way, water rights and irrigation structures situated in Boise and Canyon counties, Idaho, and constructed by the Canyon Canal Company under contract with the State of Idaho, and now owned and operated by the Emmett Irrigation District, all of which property was particularly and at length described in said deed.

Said deed further provided: "It is understood, however, that the said property, lands, water rights and irrigation structures are transferred to the party of the second part, subject to all legal charges, liens and claims against the same."

Said Exhibit 3 is a quitclaim deed, also dated August 15, 1911, made, executed and delivered by the Emmett Bench Canal Company to the Emmett Irrigation District as grantee. After conveying the same property described in Exhibit No. 2 to the said Emmett Irrigation District it provided as follows: "It is understood, however, that the said property, lands, water rights and irrigation structures are transferred to the party of the second part, subject to all legal charges, liens and claims against the same."

CROSS-EXAMINATION BY MR. HAGA

The Emmett Bench Canal Company, during the time it was in possession of the system paid some claims created by the Canyon Canal Company. I don't know, but I don't think they were the charges, liens and claims against the property referred to in Defendant's Exhibit No. 2.

H. HAYLOR, a witness previously sworn and examined in behalf of plaintiffs, was then called and testified in behalf of defendants as follows:

DIRECT EXAMINATION BY MR. WOOD

I took possession of the office of Secretary of the defendant District January 2, 1912. The bonds were delivered after that and payment of money made. I have never kept or secured any record of the bonds as to whom they were sold and the amounts or denominations, because I could not get them. I wrote to the depository. I understood the law required such record and wrote the depository soon after the bonds were sold, but have never got the records. Neither the District, nor myself, as secretary, has any information as to who the owners or holders of the bonds are, aside from the plaintiffs in this suit.

CROSS-EXAMINATION BY MR. HAGA

I have been told of some other bondholders. Mr. John R. Morrow, of Pittsburgh, had bonds. Have had letters from a lady in Leavenworth, Kansas, in regard to the bonds, and have also understood that Mr. Reed and Mr. Craig, who has testified in this case, hold bonds.

DIRECT EXAMINATION BY MR. WOOD

I have been treasurer of the defendant district since February, 1913. I never have had any record of the ownership and place of residence of the bondholders holding the bonds of the District in this action, nor was such record turned over to me by my predecessor.

W. H. SHANE, a witness previously sworn and examined in behalf of plaintiffs and defendants, was recalled and testified in behalf of defendants, as follows:

DIRECT EXAMINATION BY MR. WOOD

I attempted to secure a record of the sale of the District Bonds just before we made the transfer of new bonds for old bonds at the Fort Dearborn Trust and Savings Bank. They had in their possession then eight hundred thousand dollars worth of bonds and there were still three hundred thousand dollars worth not delivered, and I insisted before I delivered those other three hundred thousand dollars worth that I have the numbers of all the old bondholders and the numbers of Corkill's bonds. All that was turned over, except what the Trustee had, and I held the proposition up for something like three days before I would deliver the additional bonds, but I could not get them, they absolutely refused to let me have them. Corkill refused, and Mr. Glenney, the trust officer, said "I cannot give it to you without the consent of Mr. Corkill," and I could not get the consent of Mr. Corkill. Corkill said it was none of my business, that it did not

make any difference to me where those bonds were. I was in Chicago at the time.

Whereupon, Defendants rested.

REBUTTAL

EDMOND SEYMOUR, a witness previously sworn and examined, called in rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. HAGA

I know Mr. Shane. I introduced Dr. Gaebler and Mr. Shane Monday morning. Mr. Shane said at the time that he had never met Dr. Gaebler before.

H. HAYLOR, previously sworn and examined, was called on rebuttal by the plaintiffs, and testified as follows:

Mr. Shane, as president, and myself, as secretary, signed the instrument, Plaintiff's Exhibit 5. Whereupon the same was offered and admitted in evidence, the following being a full, true and correct copy thereof.

STATEMENT OF THE FINANCIAL CONDITION OF THE EMMETT MUNICIPAL IRRIGATION DISTRICT AT THE CLOSE OF BUSINESS ON THE FIRST DAY OF FEBRUARY, 1913, AS DETERMINED BY THE BOARD OF DIRECTORS.

ASSETS

| | |
|-------------------|------------|
| Main canal | \$ 500,000 |
| Bench canal | 140,000 |
| Slope canal | 100,000 |

| | | |
|---|---------|-------------|
| Laterals | 110,000 | |
| Headgate and dam..... | 80,000 | |
| Syphon | 10,000 | |
| Right-of-way | 12,000 | |
| Decree of water—438 second feet or 21,900 miners' inches at \$40..... | 876,000 | |
| Office fixtures, tools, wagons, horses and equipment..... | 30,000 | |
| Accts. receivable | none | |
| Bonds in treasury..... | 222,400 | |
| Due on 1912 assessment..... | 60,000 | |
| Cash on hand in district..... | 6,807 | |
| | <hr/> | \$2,147,207 |

LIABILITIES

| | | |
|---|------------|-------------|
| Bonds outstanding | \$ 877,600 | |
| Bills payable | none | |
| Warrants outstanding | 161,802 | |
| Interest on warrants (esti- mated) | 3,000 | |
| Accounts payable | 26,328 | |
| Total net assets..... | 1,078,477 | |
| | <hr/> | \$2,147,207 |

I hereby certify that the foregoing is a full and true statement of the financial conditions of the Emmett Municipal Irrigation District on February 1st, 1913, as the same appears from the records of the Emmett Municipal Irrigation District Office.

H. HAYLOR, Secretary.

Attest:

W. H. SHANE, President.

Subscribed and sworn to before me this 16th day of May, 1913.

(Seal)

V. T. CRAIG,

Notary Public, in and for Canyon County, State of Idaho.

After calling Mr. Haylor's attention to the fact that the contract of September 12, 1911, provided that the District should furnish waivers from the land owners of errors and irregularities in the issuance of the bonds, he was asked if any waivers were furnished and testified as follows:

Waivers were furnished. I didn't have anything to do with their procuring, but when they came in I mailed them to Chicago. I saw some of them. They were printed.

Whereupon, the witness was shown a printed form marked "Waiver of Errors," and he stated as follows:

I should judge that was the same waiver of errors, or a copy of the waiver of errors; as far as I can see it is identical with the form that was used.

Whereupon, counsel for plaintiffs asked to have the printed form marked "Plaintiffs' Exhibit '6'" and offered it in evidence, to which offer counsel for defendants objected on the ground that said instrument was incompetent, irrelevant and immaterial and not proper rebuttal, which objection was overruled and their exception allowed.

Said Waiver of Errors, after reciting the organization of the Emmett Irrigation District, leaving a blank for a description of the lands owned by the

parties signing the same, also recited the issuance of \$1,100,000.00 of the bonds of the Emmett Irrigation District, dated January 1, 1911, that a contract had been duly authorized and executed by authority of the Board of Directors whereby a portion of said bonds were to be delivered in payment of the purchase price of the irrigation works of the District and a portion were to be sold at par to furnish funds for improving such works, that said contract was subject to the condition that the legality of the said bonds should be approved by certain legal counsel, and it was necessary that an instrument in the form of such waiver be signed and executed by the land owners in the District and that the organization of the District, the issuance of the bonds and the performance of the contract were all to the advantage of the party signing the waiver as owner of the land described therein, and provided as follows: "In consideration of the premises, and in consideration of the acceptance of the said bonds under the contract aforesaid by the parties entitled thereto under the said contract, the undersigned, as owner of the said above described land, does hereby for himself, his heirs and assigns, waive all errors, omissions or irregularities in and about the proceedings for the organization of the said District and the issuance of the said bonds, and does hereby acknowledge and declare that all of the conditions and things required by law in and about the organization of the said District and in and about the authorization and execution of the said bonds and the sale and de-

livery thereof have been done, have happened and have been performed, and that the above described lands are and forever shall be subject to the levy of a tax for the payment of the principal and interest of the said bonds according to the tenor and effect thereof, and the provisions and the true intent and meaning of the said Act.”

Mr. Haylor further testified that the original waivers were not in his possession.

W. H. Shane, a witness previously sworn and examined, upon being recalled in rebuttal testified as follows:

I had something to do with obtaining the waivers that were furnished in connection with the sale of the bonds to Corkill & Company. We did not furnish waivers from all the land owners. I know they wanted the waivers and we got them as quick as we could and sent in a certain per cent of waivers, something like 90 per cent., between 80 and 90 per cent. of the land owners.

To all of which testimony regarding waivers counsel for defendants objected on the ground that such evidence was irrelevant, incompetent and immaterial and not proper rebuttal, which objections were overruled and defendant's exceptions thereto allowed.

MR. HAYLOR, being recalled, then read in evidence the minutes of the meeting of the board of directors of May 23, 1912. Whereby it appeared that a special election was called to be held on June 22, 1912, in said District, to authorize the Board to make a levy to pay the interest to become due on the bonds

on July 1st, 1912, and directing notice thereof to be given, said interest aggregating the sum of \$33,000.

The minutes of the Directors' meeting of June 27, 1912, were then read, from which it appeared that the board canvassed the vote cast at the special election mentioned in the foregoing minutes and found 107 votes in favor of said assessment and 49 against, and that the board declared the assessment carried.

The minutes of directors' meeting of June 29, 1912, whereby it appeared that the board directed the president and secretary to draw warrants on the interest fund for the following amounts:

No. 101, \$5000.

No. 102, \$5000.

No. 103, \$5000.

No. 104, \$5000.

No. 105, \$4783.

to pay interest on coupons on bonds July 1st, 1912.

The minutes of the meeting of the board of directors of June 20, 1913, were then read. Whereby it appeared that the Secretary was directed to transfer the sum of \$26,215.08, turned over to the District by the Continental and Commercial Trust and Savings Bank of Chicago, which had been used by the District as a part of the construction account from the construction fund to the bond and interest fund, where the same properly belonged.

Further, a resolution was adopted at said meeting reciting that \$52,000 belonging to the District had been used by the District in making permanent improvements and in construction, and that there

would be outstanding on July 1st, 1913 the sum of \$79,173.81 interest on outstanding bonds with but \$27,540.27 in the interest fund, and that the District contracts with Corkill & Company was conditioned on the payment of the semi-annual interest due July 1st, 1913. And it was ordered that the board do pay the interest from available funds, without a tax levy and ordering \$52,000.00 expended for construction, as aforesaid, to be charged to construction account and credited to the bond and interest account and used for the payment of interest, and directing issuance of warrants on the interest fund to the Fort Dearborn Trust and Savings Bank of Chicago in payment of said interest.

The witness continued. The warrants which the board of directors ordered in the foregoing minutes were drawn by me and delivered to Corkill & Company or the Fort Dearborn Trust & Savings Bank.

CROSS-EXAMINATION BY MR. WOOD

No levy was ever made of any tax that was authorized by what purports to be special assessment called in June, mentioned in direct examination, nor any tax ever collected under it. The only assessment ever made for the payment of interest on these bonds was in the fall of 1913, and it produced the fund now in the hands of the Treasurer.

The July interest mentioned in direct examination was produced by the method shown in the foregoing minutes, namely, transfer from other funds.

Whereupon, counsel for defendants having prior to entering upon the defense in the action, moved

the court that either the bill be dismissed or that the other bondholders of the bonds of said district, being necessary and indispensable parties be brought in as parties to the action, in accordance with the terms set forth in defendant's answer, which motion was at the time denied, without prejudice to renewal after hearing defendants' evidence, renewed said motion and the same was taken under advisement by the court, and decided by the decree thereafter entered in the cause.

Thereafter counsel for plaintiff stated that letters had been written to various bondholders other than plaintiffs, requesting them to come in as parties plaintiff, and there were received in evidence and read the following replies thereto.

Letter dated June 3, 1916, from E. O. Pequiquet, saying he was willing to intervene, provided a majority of the bondholders did likewise, and the committee paid all costs.

A letter dated June 17, 1916, from the People's Savings Bank of Saginaw, Michigan, wanted to know if it would make any difference to them whether they consented.

Letter dated June 17, 1916, from First National Bank of Scenery Hill, Pa., saying they could not see their way clear to be made a party as there were a number of large bondholders whom they thought should take the lead.

Letter dated May 27, 1916, from the Adrian, Michigan, State Savings Bank saying they would rather lose than to have it known that they owned the bonds.

Letter dated July 28, 1916, from First National Bank, Highland, Illinois, consenting, and Maria H. Chaffee, dated July 8, 1916, consenting.

Letter from Charles P. Poole, dated July 26, 1916, stating how he obtained the bonds, but neither consenting or declining to come in.

Letter dated June 13, 1916, from Northern Trust Company stating that they were administrators of the estate of William L. Grey, deceased, whose estate or heirs had \$10,000.00 of Emmett bonds, but that the Trust Company was unable to furnish any information regarding same.

Letter from Andrews and Ellis, dated May 29, 1916, regarding bonds of Grant M. West and asking for further information about the suit.

It was admitted by counsel for plaintiffs that the plaintiffs J. Paul Thompson and Henry M. Williams had filed no answers or response to the interrogatories submitted to them by defendants under Equity Rule 58.

Whereupon, both plaintiffs and defendants rested and the cause was argued and taken under advisement.

After the submission of said cause and prior to the entry of decree herein, it was stipulated by and between the parties hereto, through their respective attorneys, that the deposition of E. C. Glenny taken in this cause might be corrected as to the description of the bonds now held in escrow by the Fort Dearborn Trust and Savings Bank in accordance with affidavits filed in this cause, it being expressly

understood that defendants did not thereby admit the correctness of said deposition as it originally stood or as corrected, either as to the description of the bonds or the number or amount of the same. The corrections referred to in said stipulation and shown by said affidavit were as follows:

Bonds No. D871-986 were substituted for bonds No. D871-896, the par value of said block of bonds being correctly stated in said deposition.

The following bonds were added:

Nos. C76, 80, 116, 117, 118, at \$100.00, \$500.00.

No. D658 at \$500.00, \$500.00.

The following bonds and amounts were stricken:

No. M17 at \$1000.00, \$1000.00.

Nos. D136 and 1067 at \$500.00, \$1000.00.

Respectfully submitted as statement of the evidence to be included in the record of said cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of practice for courts of equity of the United States.

J. M. THOMPSON,
FREMONT WOOD,
DEAN DRISCOLL,

Solicitors for each and all defendants above named.

Service of the within and foregoing statement, by receipt of copy thereof, this 22nd day of September, 1917, is hereby admitted.

RICHARD & HAGA,
McKEEN F. MORROW,

Solicitors for each and all the Plaintiffs above named.

Notice of presentation for allowance of the within and foregoing statement of evidence having been given for October 3d, 1917, at which time the Judge of the above entitled court was absent, the same was presented at this time, by mutual consent of counsel for all parties, for approval, together with the amendments prepared by the appellees, and it appearing to me that said statement and said proposed amendments were lodged in due time with the Clerk of this court and that all said proposed amendments are correct and have been engrossed on said original statement by agreement of counsel, and that the same is now a true and complete statement of the evidence had on the trial of said cause, and that the same is properly prepared;

It is hereby ordered and certified, counsel for all parties being present and consenting thereto, that the same is in all respects a full, true and complete and properly prepared statement of the evidence and proceedings had at the trial of said cause, and the same is hereby settled, allowed and approved as such.

Dated October 6th, 1917.

FRANK S. DIETRICH,
Judge.

Lodged Sept. 22, 1917.

Endorsed: Filed October 8, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 479.

PETITION FOR APPEAL

Now comes each and all the defendants above named and feeling themselves agrieved by the decree made and entered in this cause on the 16th day of July, A. D. 1917, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they and each of them pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in the City of San Francisco in the State of California.

And your petitioners further pray that the proper order touching the security to be required of them and each of them to perfect said appeal be made; and, further, that an order be made suspending, during the pendency of said appeal, on such terms as to bond or otherwise as may be considered proper, that portion of said decree providing that the said defendants, so far as the matter comes within their official duties, apply the money now in the bond fund of said district or that may hereafter be paid into said bond fund under the tax levied on the 22nd day of October, 1913, to the payment of interest cou-

pons attached or belonging to bonds outstanding, mentioned in said decree.

J. M. THOMPSON,
FREMONT WOOD,
DEAN DRISCOLL,

Solicitors for each and all the Defendants above named.

ORDER ALLOWING APPEAL AND SUSPEND-
ING A PORTION OF DECREE DURING
THE PENDENCY OF APPEAL

AND NOW, to-wit, on the 22nd day of September, A. D. 1917, it is ordered that the petition be granted and the appeal allowed; and it is further ordered that that portion of the said decree filed and entered in the said cause on July 16th, 1917, providing that the defendants, so far as the matter comes within their official duties, apply the money now in the bond fund of said district or that may hereafter be paid into said bond fund, under the tax levied on the 22nd day of October, 1913, in payment of interest coupons attached or belonging to the bonds outstanding, mentioned in said decree, be suspended during the pendency of said appeal, all on the condition that said defendants file bond in the sum of FIVE THOUSAND (\$5000) DOLLARS with sufficient sureties to be approved by this Court, and conditioned that the said defendants and appellants shall prosecute said appeal to effect and answer all costs if they or any of them fail to make their plea good; and further, and in addition there-

to, if they or any of them fail to make their plea good, answer all damages, costs and charges arising by reason of said suspension during the pendency of said appeal of the portion of said decree hereinbefore referred to.

FRANK S. DIETRICH,
District Judge.

Service of the foregoing petition, by receipt of copy thereof, this 22nd day of September, 1917, is hereby admitted.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for each and all the Plaintiffs above named.

Endorsed: Filed September 22, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

In Equity 479.

ASSIGNMENT OF ERRORS

COME NOW the defendants above named, by J. M. Thompson, Fremont Wood and Dean Driscoll, their solicitors of record, and having filed herewith their petition for the allowance of their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain decree filed and entered in the above entitled cause in the above entitled court on the 16th day of July, 1917, and say that said decree is erroneous and unjust to the said defendants and each of them and that, in the records and proceedings of said cause there is manifest error in the following particulars, to-wit:

I.

Because the Court erred in holding and decreeing that the bonds of defendant district alleged to be owned and held by the plaintiffs, J. Paul Thompson and Henry M. Williams, are legal, valid obligations of defendant district, for the reasons that:

(a) Neither of said plaintiffs, J. Paul Thompson or Henry M. Williams, at any time filed any answer whatsoever to interrogatories for discovery filed by defendants in said court and cause, on the 17th day of August, 1916, for discovery by said plaintiffs, in accordance with the 58th Rule of Practice for courts of equity of the United States, promulgated by the Supreme Court of the United States November 4, 1912.

(b) In that no evidence whatever was introduced at the trial of said cause, nor admissions made at said trial, or in the pleadings of said cause, or elsewhere, in support of the allegations of plaintiffs' complaint as amended, so far as the same refers to said plaintiffs, Thompson and Williams, or showing said plaintiffs entitled to any relief, or supporting said decree or any part thereof, in any manner, so far as the same affects the said plaintiffs J. Paul Thompson and Henry M. Williams.

II.

Because the Court erred in holding and decreeing that the said defendants and each of them and their successors in office be enjoined and restrained from diverting or otherwise applying or using the moneys collected for or hereafter paid into the bond

fund, created or required by law to be created, to purposes other than the payment of principal and interest on the bonds of the said plaintiffs, Thompson and Williams among others, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

III.

Because the Court erred in holding and decreeing that said defendants be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund, or that may hereafter be paid into said fund, under the tax levy of the 22nd day of October, 1913, to the payment of any of the coupons originally attached or belonging to the bonds of the said plaintiffs, Thompson and Williams, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

IV.

Because the Court erred in decreeing to the said plaintiffs, J. Paul Thompson and Henry M. Williams, any relief whatsoever, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

V.

Because the Court erred at the trial of said cause in overruling said defendants' motion to dismiss said action as to the plaintiffs J. Paul Thompson and Henry M. Williams, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

VI.

Because the Court erred in overruling and denying defendants' motion, at the trial of said cause, that all of the holders of outstanding bonds of said defendant district be brought in as parties to this action.

VII.

Because the Court erred in proceeding with the trial, and the hearing of said cause and the entering of said or any decree in said cause in favor of said plaintiffs or any of them, or any other bondholders similarly situated, in that the plaintiffs' bill as amended is defective for want of and by reason of non-joinder of parties, to-wit, holders of other outstanding bonds of series one and issue one of said defendant district.

VIII.

Because the Court erred in holding and decreeing that bonds of defendant district alleged to be held and owned by persons other than plaintiffs to this action are legal and valid obligations of said district, for the reason that such holders are not parties to the action.

IX.

Because the Court erred in holding and decreeing that the defendants be perpetually restrained and enjoined from diverting or otherwise appropriating, applying or using for any purposes other than the payment of principal and interest as the same become due, on said bonds or coupons, the money collected for or hereafter paid into the bond fund, cre-

ated, or required by law to be created for the payment of the principal and interest on said bonds, so far as the same affects bonds held by persons other than the plaintiffs in this action, for the reason that such holders are not parties to the action.

X.

Because the Court erred in holding and decreeing that the said defendants and each of them be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund or that may hereafter be paid into the bond fund, under the tax levied on the 22nd day of October, 1913, to the payment of any interest coupons, originally attached or belonging to the bonds outstanding and held by persons other than the plaintiffs in said action, for the reason that said holders are not parties to the action.

XI.

Because the Court erred in making or entering any decree with respect to bonds or coupons owned or held by persons other than the plaintiffs in the action, for the reason that said owners or holders are not parties to this action.

XII.

Because the Court erred in entering any decree, granting any relief to the plaintiffs or to any holder of bonds of said district similarly situated, or otherwise, in that none of the bonds in controversy in the cause were introduced in evidence upon the trial of said cause.

XIII.

Because the Court erred in holding and decreeing that any bonds of said district outstanding were valid and legal obligations of said district, in that no bonds of said district were introduced in evidence at the trial of said cause.

XIV.

Because the Court erred in holding and decreeing that bonds delivered to Corkill & Company under subdivision (c) of paragraph five, on page seven of the original contract of September 12, 1911, copy of which was introduced in evidence and attached to defendants' answer as Exhibit "A" thereof, said subdivision reading as follows:

"Upon the execution in favor of the District of the above transfers and assignments mentioned above in Section 2 hereof, and upon the deposit of said papers with the depositary, the parties of the second part shall be entitled to receive \$220,000 par value in amount of the said bonds with the January 1st, 1912, and all subsequent coupons attached thereto, but the said \$220,000 par value in amount of bonds shall be held by the depositary as security for the compliance of the parties of the second part with the terms of this contract and delivered to them as hereinafter set forth."

are valid and legal obligations of said district, for the reason that the same were issued to said Corkill & Company as commission for services, and not for cash or canals or works or for any other consideration authorized by law.

XV.

Because the Court erred in holding and decreeing that the defendants, and each of them, and their successors in office, be restrained and enjoined from diverting or using money collected for or hereafter paid into the bond fund created, or required by law to be created for the payment of principal and interest on said bonds, to purposes other than the payment of principal and interest on the outstanding bonds of said district mentioned in said decree, including bonds and coupons delivered to Corkill & Company under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof; said subdivision (c) of said paragraph reading as set forth in the last preceding assignment of error, for the reason that the said bonds and coupons delivered to Corkill & Company under said paragraph were issued to them as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVI.

Because the Court erred in holding and decreeing that said defendants and each of them be ordered and directed, so far as the matter comes within their official duties, to apply money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levy of the 22nd day of October, 1913, to the payment of any of the coupons belonging or attached to bonds delivered to Corkill & Company, under subdivision (c) of para-

graph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which is set forth on assignment of error Number XIV herein, for the reason that said bonds and coupons were issued to said Corkill & Company as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVII.

Because the Court erred in holding and decreeing any relief in favor of the holders of bonds and coupons delivered to Corkill & Company, under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which subdivision of said paragraph five is set forth in the XIV assignment of error herein, for the reason that the same were issued to said Corkill & Company for services rendered and not for cash, or canals or works, or for any other consideration authorized by law.

XVIII.

Because the Court erred in holding and decreeing that any outstanding bonds of the district are valid and legal obligations of the said district, for the reasons that:

(a) Said bonds, other than those sold and delivered for cash, were not issued for canals, for works or cash at par, or for any other consideration authorized by law.

(b) Said bonds were not signed by the Presi-

dent or Secretary of the defendant district in office at the time the same were issued or delivered.

(c) Said bonds do not mature at the periods or intervals prescribed by law.

(d) No portion of said bonds, except those sold and delivered to Corkill & Company for cash, were issued and sold at par and accrued interest.

(e) Because the plaintiffs and each of them refuse to do equity, by furnishing to the defendants the names of the holders and owners of said bonds and the numbers and denominations held by each.

(f) None of the holders of bonds or coupons outstanding, other than the actual plaintiffs, were shown to be bona fide holders of the same.

XIX.

Because the Court erred in holding and decreeing that the defendants and each of them and their successors in office be perpetually enjoined and restrained from diverting or otherwise appropriating, applying or using for any purpose other than for the payment of principal or interest as the same becomes due according to the tenor of said bonds, money collected for or hereafter paid into the bond fund created or required by law to be created for the payment of principal and interest on said bonds, for the reasons set forth in subdivisions (a), (b), (c), (d), (e), and (f) of the XVIII. assignment of error herein.

XX.

Because the Court erred in holding and decreeing that said defendants and each of them, so far as

the matter comes within their official duties, apply the money now in said bond fund, or that may hereafter be paid into said bond fund under the tax levied on the 22nd day of October, 1913, to the payment of any of the outstanding interest coupons belonging to or attached to the outstanding bonds of said district, for the reasons set forth in subdivisions (a), (b), (c), (d), (e) and (f) of the XVIII assignment of error herein.

XXI.

Because the Court erred in holding and decreeing any relief to the plaintiffs or any of them, or any person similarly situated, for the reasons set forth in subdivision (a), (b), (c), (d), (e), and (f) of the XVIII. assignment of error herein.

XXII.

Because the Court erred in sustaining plaintiffs' objections, that the matter was irrevelant, immaterial and not the best evidence, to the question asked by counsel for defendants of the witness Harry S. Worthman, which was that the said witness state, if he knew, the capacity of said canal in comparison with the total volume of water sold by the Canyon Canal Company, to which ruling counsel for defendants then and there excepted, which said exception was by the Court allowed.

XXIII.

Because the Court erred in sustaining the objection made by counsel for plaintiffs, that the same was irrelevant, immaterial and not the best evi-

dence to the question asked by counsel for defendants of the witness Harry S. Worthman, requesting said witness to state what he knew about the service involving the delivery of water of the Canyon Canal Company to the users of water under the canal prior to the time of taking over the property by the holding company, to which said ruling counsel for defendants then and there excepted, which said exception was by the court allowed.

XXIV.

Because the Court erred in sustaining plaintiffs' objection, on the ground that the same was irrelevant, immaterial and not the best evidence to the defendants' offer to prove by the witness Harry S. Worthman that there had been a total failure by the Canyon Canal Company to furnish water to the land owners under the canal, under said water contracts, to which said ruling counsel for the defendants then and there excepted, which exception was by the court allowed.

WHEREFORE, the defendants and each of them pray that the said decree be reversed and the said District Court directed to dismiss said bill and to render such decree as shall be meet and just.

J. M. THOMPSON,
FREMONT WOOD,
DEAN DRISCOLL,

Solicitors for each and all the Defendants and Appellants above named.

Service of the within and foregoing assignment

of errors, by receipt of copy thereof this 22nd day of September, 1917, is hereby acknowledged.

RICHARDS & HAGA,

McKEEN F. MORROW,

Solicitors for each and all the Plaintiffs and Respondents above named.

Endorsed: Filed September 22, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we the EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, personally and as directors, and R. B. SHAW, personally and as Treasurer, of said Emmett Irrigation District, as principals, and JOHN McNISH and V. T. CRAIG as sureties, acknowledge ourselves indebted to and are held and firmly bound to plaintiffs and appellees above named, to-wit, J. Paul Thompson, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and National Bank of Oxford, a corporation, and each of them, for themselves and all other bondholders of the Emmett Irrigation District similarly situated, in the sum of FIVE THOUSAND (\$5000.00) DOLLARS, for the payment of which well and truly to be made we bind

ourselves and each of us, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of September, A. D. 1917.

The condition of this obligation is such that,

WHEREAS, on the 16th day of July, 1917, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that court wherein the above named plaintiffs were plaintiffs and the above named defendants were defendants, numbered on the Equity Docket in said Court as 479, a decree was rendered against the said defendants, and each of them, and the said defendants and each of them having prosecuted and obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the District Court to reverse said decree, and a citation directed to said plaintiffs and appellees and each of them, citing and admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California on the 22nd day of October, 1917.

NOW if the said defendants and appellants above named, and each of them, shall prosecute said appeal to effect and answer all costs if they or any of them fail to make their plea good, and, further, and in addition thereto, if they or any of them fail to make their plea good, answer all damages, costs and

charges arising by reason of the suspension during the pendency of said appeal by an order of said District Court, filed September 22nd, 1917, of that portion of said decree, providing that defendants, so far as the matter comes within their official duties, apply the money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levied on the 22nd day of October, 1913, to the payment of interest coupons attached or belonging to the bonds outstanding mentioned in said decree, then the above obligation shall be void, otherwise the same shall remain in full force and virtue.

EMMETT IRRIGATION DISTRICT.

By W. H. SHANE, President.

Attest: H. HAYLOR,

(Seal)

Secretary.

W. H. SHANE,

E. J. REYNOLDS,

N. B. BARNES,

R. B. SHAW,

Principals.

JOHN McNISH and

V. T. CRAIG,

Sureties.

Approved: DIETRICH, Judge.

September 22, 1917.

State of Idaho,

County of Gem,—ss.

John McNish and V. T. Craig, being first duly sworn, each for himself deposes and says: That he is a resident and householder within the County of

Gem, State and District of Idaho, Southern Division; that he is worth the amount specified in the within and foregoing bond over and above all his just debts and obligations, exclusive of property exempt from execution, and, more particularly, affiant John McNish says that he is the owner of real property in the County of Gem, State of Idaho of the total value of not less than Fifty Thousand Dollars, and that his total debts and liabilities do not exceed Five Thousand Dollars; and the affiant, V. T. Craig says that he is the owner of real property in the County of Gem, State of Idaho, of the total value of not less than Seven Thousand Dollars, and that his total debt and liabilities do not exceed Two Thousand Dollars.

JOHN McNISH.

V. T. CRAIG.

Subscribed and sworn to before me this 22nd day of September, A. D. 1917.

J. P. REED,
Notary Public.

(Seal.)

Residing at Emmett, Gem County, Idaho.

Endorsed: Filed September 22, 1917. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 479.

STIPULATION AS TO CONTENTS OF RECORD
ON APPEAL

It is hereby stipulated and agreed by and between plaintiffs and respondents and defendants and ap-

pellants in the above named cause, through their respective solicitors of record, that the following papers and documents constitute all the portion of the record in said cause which are necessary, material or pertinent to the presentation and decision of all questions and matters arising on the appeal in said cause taken by the defendants to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco on the 22nd day of September, 1917, from that certain decree made and entered in said cause by the above entitled court on the 16th day of July, 1917, and that the following described parts of said record and no more, shall constitute the entire record, to be transcribed, certified and included in the record to be transmitted to said Circuit Court of Appeals, on said appeal above described; provided, that if said Circuit Court of Appeals shall on its own motion determine that any part of the record not included in the printed transcript should have been so included for the information or convenience of the court, or if either party shall hereafter desire any additional portion of the record certified to said Court or printed as part of the record, the same may be certified up to said Circuit Court of Appeals, and, if required, printed as a supplement to the record, at the expense in the first instance of the appellants.

The papers referred to in this stipulation as necessary and to constitute said record on said appeal are as follows, to-wit:

Original Bill of Complaint,

Amendments to Bill of Complaint.

Answer.

Stipulation admitting additional parties.

Order bringing in additional parties.

Amendments to Bill.

Stipulation Amending Answer.

Interrogatories for Discovery addressed to J. Paul Thompson and others.

Decision.

Decree.

Petition for Appeal.

Order Allowing Appeal and Suspending Injunction.

Bond, showing approval of Judge.

Assignment of Errors, and acknowledgement of service.

Citation and acknowledgement of service.

Statement of evidence and order settling and allowing same.

Copy of this Stipulation.

Praeceptum to the Clerk for record, certificate and return.

J. M. THOMPSON,
FREMONT WOOD and
DEAN DRISCOLL,

Attorneys for Defendants and Appellants.

RICHARDS & HAGA and
McKEEN F. MORROW,

Attorneys for Plaintiffs and Respondents.

Endorsed: Filed September 27, 1917. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 479.

PRAECIPE TO THE CLERK FOR TRANSCRIPT
ON APPEAL

To the Clerk of the above entitled Court:

The Defendants above named, having on the 22nd day of September, A. D. 1917, taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, from said certain decree made and entered in said cause in the above entitled court on the 16th day of July, 1917, you will please prepare, certify, print, return and transmit to said Circuit Court of Appeals, transcript of the record in said cause, in accordance with the Act of Congress, approved February 13, 1911, entitled An Act to Diminish the Expense of Proceedings on Appeal and Writ of Error or of Certiorari and rules of Court adopted thereunder, including therein the following portion of the record in said cause, in accordance with the stipulation of all parties to said action and to said appeal, filed herewith, to-wit:

Original Bill of Complaint.

Amendment to Bill of Complaint.

Answer.

Stipulation, admitting additional parties.

Order, bringing in additional parties.

Amendments to Bill.

Stipulation Amending Answer.

Interrogatories for Discovery, addressed to J. Paul Thompson and others.

Decision.

Decree.

Petition for Appeal.

Order Allowing Appeal and Suspending Injunction.

Bond, showing approval of Judge.

Assignment of Errors and acknowledgment of service.

Citation and acknowledgement of service.

Statement of Evidence and Order settling and allowing same.

Stipulation as to Contents of Record on Appeal.

Copy of this Praecipe.

Certificate and Return.

J. M. THOMPSON,
FREMONT WOOD and
DEAN DRISCOLL,

Solicitors for the Defendants and Appellants above named.

Service of the within and foregoing Praecipe, by receipt of copy thereof this 27th day of September, 1917, is hereby acknowledged.

RICHARDS & HAGA and
McKEEN F. MORROW,

Solicitors for Plaintiffs and Respondents.

Endorsed: Filed September 27, 1917. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division*

J. PAUL THOMPSON, A. N. GAEBLER, HELEN
M. CONRAD, S. H. HUDSON, HENRY M.
WILLIAMS, CHARLOTTE H. SHIPMAN, F.
W. HORTON, MARY C. WADDELL, J. WILLIS
GARDNER, CHESTER COUNTY TRUST
COMPANY, a corporation, LINCOLN UNIVER-
SITY, a corporation, and NATIONAL BANK OF
OXFORD, a corporation, for themselves and all
other bondholders of Emmett Irrigation District,
similarly situated, Plaintiffs,

vs.

EMMETT IRRIGATION DISTRICT, a municipal
corporation, W. H. SHANE, N. B. BARNES, and
E. J. REYNOLDS, as Directors, and R. B. SHAW,
as Treasurer of the Emmett Irrigation District,
Defendants.

In Equity No. 479

CITATION.

United States of America,—ss.

To J. Paul Thompson, A. N. Gaebler, Helen M.
Conrad, S. H. Hudson, Henry M. Williams, Char-
lotte H. Shipman, F. W. Horton, Mary C. Waddell,
J. Willis Gardner, Chester County Trust Company,
a corporation, Lincoln University, a corporation, and
National Bank of Oxford, a corporation, for them-
selves and all other bondholders of Emmett Irriga-
tion District, similarly situated, Greeting:

You, and each of you, are hereby cited and ad-
monished to be and appear in the United States Cir-

cuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, in the above entitled cause wherein the defendants above named, to-wit, Emmett Irrigation District, a municipal corporation, W. H. Shane, N. B. Barnes and E. J. Reynolds as Directors, and R. B. Shaw, as Treasurer of the Emmett Irrigation District, are appellants, and you, J. Paul Thompson, A. N. Gaebler, Helen M. Conrad, S. H. Hudson, Henry M. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and National Bank of Oxford, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated, said plaintiffs above named, are respondents, to show cause, if any there be, why the decree appealed from in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, Judge of the United States District Court for the District of Idaho, this 22nd day of September, A. D. 1917, and of the Independence of the United States the one hundred and forty-second year.

FRANK S. DIETRICH,

(Seal.)

District Judge.

Attest: W. D. McREYNOLDS, Clerk.

Service of the within and foregoing citation, by receipt of copy thereof this 22nd day of September, A. D. 1917, is hereby acknowledged.

RICHARDS & HAGA,
McKEEN F. MORROW,

Solicitors for each and all the Plaintiffs and Respondents above named.

Filed September 22, 1917. W. D. McReynolds,
Clerk.

RETURN TO RECORD

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

(Seal.)

W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause.)

No. 479.

CLERK'S CERTIFICATE

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered 1 to 238, inclusive, contain true and correct copies of the Original Bill of Complaint, Amendment to Bill of Complaint, An-

swer, Stipulation admitting additional parties, Order bringing in additional parties, Amendments to Bill, Stipulation amending answer, Interrogatories for discovery, addressed to J. Paul Thompson and others, Decision, Decree, Statement of Evidence, Petition for appeal and order allowing same, Assignment of Errors, Bond on Appeal, Stipulation as to Record on Appeal, Praeipie, Original Citation, Return to record and Clerk's certificate, in the cause aforesaid, which together constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit. I further certify that the cost of the record herein amounts to the sum of \$274.85 and that the same has been paid by appellants.

Witness my hand and the seal of said Court, this 17th day of October, 1917.

(Seal.)

W. D. McREYNOLDS,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District,

Appellants,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

J. M. THOMPSON,
Residence Caldwell, Idaho.
FREMONT WOOD AND
DEAN DRISCOLL,
Solicitors for Appellants,
Residence Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District,

Appellants,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

J. M. THOMPSON,
Residence Caldwell, Idaho.
FREMONT WOOD AND
DEAN DRISCOLL,
Solicitors for Appellants,
Residence Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District,

Appellants,

VS.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

STATEMENT OF THE CASE.

This is an appeal from final decree in a suit, originally instituted on the equity side of the District Court of the United States for the District of Idaho, Southern Division, by J. Paul Thompson, as sole plaintiff, against the defendants and appellants, Em-

mett Irrigation District, its Board of Directors and Treasurer.

The principal relief sought was to have adjudged valid certain bonds in the amount of \$101,000.00 and coupons thereto belonging issued by defendant District and alleged to be held by plaintiff, and to have the interest or bond fund in the hands of the defendant Treasurer applied to the payment of the coupons. All of the bonds in question constitute a part of the first issue of series number one, the first issue constituting the entire series, and the whole amount of the series and issue being the total sum of \$1,100,000.00. A copy of one of the bonds and one of the coupons appears on pages 121-125 of the transcript, and except as to numbers, amounts and dates of maturity all the bonds and coupons are identical (Transcript page 120).

The cause was previously before this Court on plaintiff's appeal from an order dismissing the bill for want of equitable jurisdiction, which order was reversed and the cause sent back for further proceedings on the equity side of the court. (227 Federal, 560.)

By stipulation (Transcript pages 78-80) an order (Transcript page 81) and subsequent amendments to the bill (Transcript page 82), A. N. Gaebler, Helen M. Conrad, F. H. Hudson, Henry L. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and the National Bank of Oxford, a corporation, were thereafter made co-plaintiffs, with the

same standing as if they had been plaintiffs from the institution of the action.

The original suit was brought, as alleged in the original complaint by plaintiff, "for himself and all other holders of bonds of said District who may desire to join in this proceeding and pay their proper proportion of the costs thereof" (Transcript page 24), and on the bringing in of the new parties plaintiff the title of the case was changed to include the names of any plaintiffs, and by inserting after the names of the plaintiffs the following, "for these and all other bondholders of the Emmett Irrigation District similarly situated" (Transcript page 79).

The cause came on for trial on the merits on April 16, 1917, in open court, before the Honorable F. S. Dietrich (Transcript page 117). The decision of the court is found on pages 95 to 114 of the transcript, and pursuant to said decision decree was entered on July 16, 1917 (Transcript page 115), adjudging all the outstanding bonds of the said series and issue, and the coupons thereto belonging, legal and valid obligations of the defendant district, irrespective of whether the same were held by the parties to the action or other persons similarly situated, or otherwise, and, secondly, enjoining the defendant Directors and Treasurer from using the moneys in the bond or interest fund for any other purpose than the payment of principal and interest on the bonds, and directing that they apply the money now in the fund to the payment of interest coupons upon presentation, whether the same be held by parties to the action or other persons.

There is little dispute in the main on the facts of the case. It is admitted that the defendant District is an irrigation district, and as such a municipal or quasi-municipal corporation, organized September 13, 1910, under the general laws of Idaho; that the defendants, W. H. Shane, N. B. Barnes and E. J. Reynolds, were at the time of the trial its Directors, and the defendant, R. B. Shaw, its Treasurer; that regular and valid proceedings were taken by the District authorizing the issuance of the bonds hereinbefore described in the sum of \$1,100,000.00; and that on the 14th day of February in the year 1911 judgment was made and entered in the Supreme Court of the State of Idaho (19 Idaho 332), affirming a decree of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, whereby all the proceedings had and taken for the organization of the District and for the authorization of the bond issue were confirmed and approved and validated. There is, in fact, no error assigned by appellants as to any matter antedating the *authorization* of the bonds to which point, and no further, they are validated by the aforesaid decree. On the contrary, appellants' assignments of error relate entirely to the manner and condition and the consideration for the issuance and sale, all of which transpired after the original decree of confirmation.

Proper understanding of the points made in that connection, however, requires a brief survey of the matters leading up to the sale and the District's situation at the time thereof. The irrigation works and

system hereinafter referred to as transferred to the District as part of the consideration for the bonds, and which lie within the District, were constructed by a company known as the Canyon Canal Company, under contract with the State of Idaho, pursuant to the provisions of the Carey Act (Transcript page 193). At that time the lands to be irrigated were part of the public domain, and were segregated pursuant to the provisions of the said Carey Act. At the time of the original construction, there were about 18,000 or 19,000 acres in all, and 4,000 acres were added thereafter (Transcript page 194). This company sold contracts for water rights to settlers and prospective settlers for the land (Transcript page 194). The Emmett Bench Canal Company was the settlers' holding company under the Carey Act (Transcript page 176). On August 15, 1911, the Canyon Canal Company transferred by quit-claim deed the entire system to the said Emmett Bench Canal Company, subject to all legal charges, liens and claims against the same (Transcript pages 199-200), and on the same day the Emmett Bench Canal Company transferred the same, subject to the same provisions as to charges and liens, by quit-claim deed to the defendant District. The District on that day took possession of the system, and has operated it ever since (Transcript pages 199-200). In the meantime, the Board of Directors of the District had taken the necessary and proper preliminary proceedings, and given the proper notice, for the sale of the entire series and issue of the bonds of the District (Transcript page 119), but the same remaining un-

sold on September 12, 1911, the Board entered into a contract with J. J. Corkill & Company, of Chicago, Illinois, for the sale of the entire series and issue, which contract was introduced in evidence (Transcript page 127), and appears in full as Exhibit "A" to the defendants' answer (Transcript page 60). In substance, this contract provides that the entire series and issue of bonds shall be placed with the Ft. Dearborn Trust & Savings Bank of Chicago, Illinois, as depositary, a large portion, through the efforts of Corkill & Company, to be exchanged for the outstanding obligations of the Canyon Canal Company, a similar portion to be delivered to Corkill & Company for cash, and a portion to be delivered to Corkill & Company as commission.

There were certain contracts supplemental to this original contract, one of which appears on pages 131 to 148 of the transcript, but none of these supplemental contracts are thought to have any bearing on the points presented in this argument. However, much of the question concerning the bonds does hinge on the contract of September 12, 1911, and a more detailed analysis is therefore necessary.

Bearing in mind that the properties of the Canyon Canal Company had been previously transferred to the District, as hereinbefore shown, it will be noticed from recitals of the contract (Trans. page 61) that "The District desires to purchase the property of the said Canyon Canal Company, and the said party of the second part (Corkill & Company) are able to sell and deliver to the District the said properties," then follows a recital of the various outstanding obliga-

tions to which the properties of the said Canyon Canal Company were subject, of which the following is a tabulation (Transcript pages 61-62-63) :

\$170,000.00 (principal) First Mortgage Gold Bonds.

100,000.00 Second Mortgage Collateral Trust Bonds, dated July 1, 1906.

100,000.00 Notes secured by water contracts, notes dated December 15, 1908.

200,000.00 Notes, dated May 1, 1909.

\$570,000.00 Total.

Coming to the actual agreement (Transcript page 64), Corkill & Company agreed to use their best efforts with the holders of the Canyon Canal Company obligations to secure the exchange of the same for District bonds, when the District should deposit the same with the depositary, to cause the canal system to be conveyed to the District (which has already been done, but not by Corkill & Company's efforts), and also at the time when the bonds should be deposited to assign or cause to be assigned "the unsecured claim or claims against the Canal Company held by Trowbridge & Niver Company" (Transcript page 65), and cause to be released to the District, when the transfer of the Canyon Canal Company obligations had been completed, all the water contracts and cash held by trustees for the creditors of the Canyon Canal Company, and transfer to the District all the right, title and interest of the Trowbridge & Niver Company in and to any stock of the Canal Company (Transcript pages 66-67). Corkill

& Company further agreed (Transcript, Sec. 6, page 69) to purchase \$280,000.00 in amount in District bonds for cash.

On the other hand, the District obligated itself to deposit the entire series and issue of bonds with the depository (Transcript, Sec. 4, page 67), and instruct the depository to deliver the same as follows (Transcript pages 67-68-69):

- (a) \$470,000.00 in amount for equal amount at par of Canyon Canal Company bonds, dated June 15, 1905, or notes dated December 15, 1908, or notes dated May 1, 1909.
- (b) \$130,000.00 par in amount for \$100,000.00 in amount of second and collateral trust bonds of the Canyon Canal Company, together with \$30,000.00 accrued interest thereon.
- (c) \$220,000.00 par value in amount of the District bonds to be delivered to Corkill & Company upon the performance by Corkill & Company of the obligations set forth in Section 2 (page 65 of the transcript), which bonds were to be held by the depository as security for the performance by Corkill & Company of the terms and conditions of the contract (Transcript, Sec. C, page 69), and delivered to Corkill & Company, as appears on page 70 of the transcript, in amounts equalling 25 per cent of the bonds of the district exchanged for Canyon Canal

Company obligations, and 25 per cent of the District bonds paid for by Corkill & Company in cash.

- (d) \$280,000.00 in amount, being the remainder of the bonds, to be delivered to Corkill & Company for cash in stipulated installments, as set forth in Sec. 6, pages 69-70 of the transcript.

It will be noted that provision is thus made for the disposition of the entire issue of \$1,100,000.00, and, on the other hand, for the retirement of all the obligations of the Canyon Canal Company, secured or unsecured. The performance had under the terms of the contract is shown almost entirely by the deposition of Ernest C. Glenney, trust officer of the Fort Dearborn Trust & Savings Bank, the Depositary (T. pp. 127-157), from which it appears that \$800,000.00 of the District's bonds were received by the Depositary about January 5th, 1912, and the remaining \$300,000 about February 29th, 1912 (P. 127 T.). The disposition of the bonds made by the Depositary may be conveniently tabulated, as follows:

\$496,000.00 for Canyon Canal Company bonds, dated June 15th, 1905, or notes dated Dec. 15, 1908, or notes dated May 1st, 1909, pursuant to subdivision (a) of section 5 of the original contract (T. pp. 67-68 and 128);

\$130,000.00 in amount, for \$100,000.00 of collateral trust bonds of the Canyon Canal Company and \$30,000.00 for account interest (T. p. 128),

pursuant to section 5 (b) of the original contract (T. p. 68);

\$175,000.00 in amount to Corkill & Company (approximately computed from p. 128 Trans.), pursuant to the provisions of section 5 (c) of the original contract (T. pp. 69-70);

\$148,900.00 for cash (T. p. 128) under the provisions of paragraph 5 (d) of section 6 of the original contract (T. pp. 69-70).

Mr. Glenny gives as the total amount delivered, \$897,600.00 (T. p. 128), and says in addition that \$25,000.00 in amount were returned to the District (T. p. 129), leaving \$177,400.00 in amount in the Depository's possession.

This leaves outstanding of the total issue of bonds, \$897,600.

Of the interest payments following the issuance of the bonds, the January 1st, 1912, July 1st, 1912, and January 1st, 1913, payments were paid by funds furnished by Corkill & Company, and the July 1st, 1913, by funds received from the District (Glenny, p. 156 T.), and the cash for this payment was raised not by levy and assessment, but by transfer from the construction fund of moneys which had been originally received from the Trustees for creditors of the Canyon Canal Company under the District's original contract with Corkill & Company (T. pp. 208-209). The only assessment ever made by the District for the payment of interest on the bonds was in the fall of 1913 (T. p. 209). The District did make a levy at that time (T. pp. 20 and 38), and

still has on hand the fund derived therefrom, nothing having been paid out from it, and the fund totals at the present time practically \$8,000.00 (T. p. 157).

It is admitted that the coupons maturing January 1st, 1914, and thereafter, have not been paid in any manner.

From the entire record herein it is impossible to determine what bonds were issued to any particular person or for any particular purpose. In other words, no bonds can be identified from the present evidence. The depositary kept no such record (T. p. 156), nor any record sufficient to identify any particular bond (T. p. 155), and the trust officer, acting for the Depositary, refused to produce even such record as was kept (T. p. 155). The District kept none, could get none from the Depositary, and has no information to who the owners or holders of the bonds are, aside from the plaintiffs in this suit (T. pp. 201-202), and the president of the District was told by the Depositary that it could not be had without Mr. Corkill's consent, and Mr. Corkill informed him that it was none of his business (T. p. 202).

It also appears from the testimony of Edmond Seymour (pp. 181-193 T.) that the present suit is maintained by a Bondholders Committee (T. p. 185) and that all the plaintiffs bonds are deposited with the Committee among the other (T. p. 185); that the Committee is composed of Edmond Seymour, Adolph N. Gaebler, J. Paul Thompson and John R. Morrow; that the New York Trust Company is the Depositary for the bonds turned over to the Committee (T. pp. 181-182). The amount of the out-

standing bonds in the hand of the Committee is \$728,100.00 (T. p. 185), all of which bonds were deposited with the Committee under a Bondholders' agreement, dated October 24, 1914, whereby the bonds were deposited with the New York Trust Company, subject to the order of the Committee, and of which the Committee was to be considered as the owner in law and in equity, for the purposes of the agreement and the enforcement of all the rights, title and interest of the original depositors therein, instituting all such suits and proceedings in equity or law, or otherwise as might be expedient and proper (T. pp. 183-185).

Mr. Seymour, as chairman of the committee, testified that their depositary had a record, open to the Committee's inspection of the bonds deposited with the Trust Company (T. pp. 182 and 188), but declined to furnish the District with such information (T. pp. 183 and 193).

In addition, it should be noticed that but one bond, being numbered D-298, was offered or received in evidence (T. pp. 120-121), and that counsel for plaintiffs offered to produce any other bonds of actual plaintiffs in the case for examination, but stated that he did not desire to leave the bonds or put them in as exhibits (T. p. 186). And the only coupons introduced in evidence were those belonging to the bonds of the plaintiff Gaebler (T. p. 186).

The defendants raised the objection in paragraph 13 of their answer (T. p. 56), that the plaintiffs' complaint was defective for want of necessary and indispensable parties, namely, other holders of the

outstanding bonds of the District, and, on the trial of the cause, preparatory to entering on the defense, moved that either the bill be dismissed for want of necessary and indispensable parties or that other necessary and indispensable parties be brought in, pursuant to Equity Rule 43, which motion was by the Court overruled (T. pp. 186-187), with leave to renew the same after hearing defendants' evidence. And, upon the renewal at the close of the evidence, was renewed and taken under advisement by the Court and decided adversely, by the decree entered in the cause (T. p. 210).

Interrogatories for discovery, pursuant to Equity Rule 58, were submitted to all plaintiffs on August 17, 1916, long prior to the trial of the cause (T. pp. 91-95), and it was admitted by counsel for plaintiff that the original plaintiff, J. Paul Thompson and also Henry M. Williams had not, at the close of the trial of said cause, filed any answer or response thereto (T. p. 211). Nor was any evidence introduced whatever in support of the bill as to the two plaintiffs, who are, nevertheless, given relief in the decree.

SPECIFICATIONS OF ERROR.

The appellants specify the following errors relied upon:

GROUP 1 (Page 217 Transc.)

I.

The court erred in holding and decreeing that the bonds of defendant District alleged to be owned and held by the plaintiffs, J. Paul Thompson and Henry

M. Williams, are legal, valid obligations of defendant District, for the reasons that:

(a) Neither of said plaintiffs, J. Paul Thompson or Henry M. Williams, at any time filed any answer whatsoever to interrogatories for discovery filed by defendants in said court and cause, on the 17th day of August, 1916, for discovery by said plaintiffs, in accordance with the 58th Rule of Practice for courts of equity of the United States, promulgated by the Supreme Court of the United States November 4, 1912.

(b) In that no evidence whatever was introduced at the trial of said cause, nor admissions made at such trial, or in the pleadings of said cause, or elsewhere, in support of the allegations of plaintiffs' complaint as amended, so far as the same refers to said plaintiffs, Thompson and Williams, or showing said plaintiffs entitled to any relief, or supporting said decree or any part thereof, in any manner, so far as the same affects said plaintiffs, J. Paul Thompson and Henry M. Williams.

II.

The Court erred in holding and decreeing that the said defendants, and each of them, and their successors in office, be enjoined and restrained from diverting or otherwise applying or using the moneys collected for or hereafter paid into the bond fund, created or required by law to be created, to purposes other than the payment of principal and interest on the bonds of the said plaintiffs, Thompson and Williams among others, for the reasons set forth in sub-

divisions (a) and (b) of the first assignment of error herein.

III.

The Court erred in holding and decreeing that said defendants be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund, or that may hereafter be paid into said fund, under the tax levy of the 22d day of October, 1913, to the payment of any of the coupons originally attached or belonging to the bonds of the said plaintiffs, Thompson and Williams, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

IV.

The Court erred in decreeing to the said plaintiffs, J. Paul Thompson and Henry M. Williams, any relief whatsoever, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

GROUP 2 (Page 219 Transc.)

VI.

The Court erred in overruling and denying defendants' motion, at the trial of said cause, that all of the holders of outstanding bonds of said defendant District be brought in as parties to this action.

VII.

The Court erred in proceeding with the trial, and the hearing of said cause and the entering of said or any decree in said cause in favor of said plaintiffs, or any of them, or any other bondholders similarly

situated, in that the plaintiffs' bill as amended is defective for want of and by reason of non-joinder of parties, to-wit, holders of other outstanding bonds of series one and issue one of said defendant District.

VIII.

The Court erred in holding and decreeing that bonds of said defendant District alleged to be held and owned by persons other than plaintiffs to this action are legal and valid obligations of said district, for the reason that said holders are not parties to the action.

IX.

The Court erred in holding and decreeing that the defendants be perpetually restrained and enjoined from diverting or otherwise appropriating, applying or using for any purposes other than the payment of principal and interest as the same become due, on said bonds or coupons, the money collected for or hereafter paid into the bond fund, created, or required by law to be created for the payment of the principal and interest on the said bonds, so far as the same affects bonds held by persons other than the plaintiffs in this action, for the reason that such holders are not parties to the action.

X.

The Court erred in holding and decreeing that the said defendants, and each of them, be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund or that may hereafter be paid into the bond

fund, under the tax levied on the 22d day of October, 1913, to the payment of any interest coupons, originally attached or belonging to the bonds outstanding and held by persons other than the plaintiffs in said action, for the reason that said holders are not parties to the action.

XI.

The Court erred in making or entering any decree with respect to bonds or coupons owned or held by persons other than the plaintiffs in the action, for the reason that said owners or holders are not parties to this action.

(Transcript pages 219-220.)

GROUP 3 (Page 221 Transc.)

XIV.

The Court erred in holding and decreeing that bonds delivered to Corkill & Company under subdivision (c) of paragraph five (Transcript page 69), on page seven of the original contract of September 12, 1911, copy of which was introduced in evidence and attached to defendants' answer as Exhibit "A" thereof (Transcript page 60), said subdivision reading as follows:

"Upon the execution in favor of the District of the above transfers and assignments mentioned above in Section 2 hereof, and upon the deposit of said papers with the depository, the parties of the second part shall be entitled to receive \$220,000.00 par value in amount of the said bonds with the January 1st, 1912, and all subsequent coupons attached

thereto, but the said \$220,000.00 par value in amount of bonds shall be held by the depositary as security for the compliance of the parties of the second part with the terms of this contract and delivered to them as hereinafter set forth."

Are valid and legal obligations of said district, for the reason that the same were issued to said Corkill & Company as commission for services, and not for cash or canals or works or for any other consideration authorized by law.

XV.

The Court erred in holding and decreeing that the defendants, and each of them, and their successors in office, be restrained and enjoined from diverting and using money collected for or hereafter paid into the bond fund created, or required by law to be created for the payment of principal and interest on said bonds, to purposes other than the payment of principal and interest on the outstanding bonds of said District mentioned in said decree, including bonds and coupons delivered to Corkill & Company under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof; said subdivision (c) of said paragraph reading as set forth in the last preceding assignment of error, for the reason that the said bonds and coupons delivered to Corkill & Company under said paragraph were issued to them as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVI.

The Court erred in holding and decreeing that said defendants, and each of them, be ordered and directed, so far as the matter comes within their official duties, to apply money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levy of the 22d day of October, 1913, to the payment of any of the coupons belonging or attached to bonds delivered to Corkill & Company, under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which is set forth on assignment of error Number XIV herein, for the reason that said bonds and coupons were issued to said Corkill & Company as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVII.

The Court erred in holding and decreeing any relief in favor of the holders of bonds and coupons delivered to Corkill & Company under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which subdivision of said paragraph five is set forth in the XIV assignment of error herein, for the reason that the same were issued to said Corkill & Company for services rendered and not for cash, or canals or works, or for any other consideration authorized by law.

(Transcript pages 221-223.)

GROUP 4.

XVIII.

The Court erred in holding and decreeing that any outstanding bonds of the District are valid and legal obligations of the District for the reasons that:

(a) Said bonds, other than those sold and delivered for cash, were not issued for canals or works or cash at par, or for any other consideration authorized by law (Transcript page 223).

(c) Said bonds do not mature at the periods or intervals prescribed by law.

XIX.

The Court erred in holding and decreeing that the defendants, and each of them and their successors in office, be perpetually enjoined and restrained from diverting or otherwise appropriating, applying or using for any purpose other than the payment of principal or interest as the same becomes due according to the tenor of said bonds, money collected for or hereafter paid into the bond fund created or required by law to be created for the payment of principal and interest on said bonds, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

XX.

The Court erred in holding and decreeing that the said defendants, and each of them, so far as the matter comes within their official duties, apply the money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levied on the

22d day of October, 1913, to the payment of any of the outstanding interest coupons belonging to or attached to the outstanding bonds of said district, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

XXI.

The Court erred in holding and decreeing any relief to the plaintiffs, or any of them, or any person similarly situated, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

(Transcript pages 224-225.)

ARGUMENT.

The assignments of error contained in Group 3, being the XIV, XV, XVI and XVII specifications, and the assignment contained in Subdivision (a) of each error specified in Group 4 herein, the XVIII, XIX, XX and XXI, can be well considered together. They present our contention that the bonds, other than those sold and delivered for cash, were not issued for canals or works or cash at par, and that any other disposition is illegal and renders the bonds invalid.

It is apparent from the foregoing statement that, aside from the bonds issued for cash, all the bonds outstanding were delivered for one of two purposes, first, for debts or claims against the Canyon Canal Company; second, for commissions to Corkill & Company for their services, the latter being the \$175,000.00 par delivered pursuant to the provisions of

Section 5-C of the original contract (Transcript pages 69-70).

It is not open to dispute, that irrigation district bonds may be issued only for the purpose provided by statute, viz: for cash at par and accrued interest, pursuant to Section 2404, Idaho Revised Codes, which reads, so far as material here: "The Board may sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise carry out the purposes of this Title * * * ;" or they may be used directly for the purchase of works, under the provisions of Section 2386, Idaho Revised Codes, reading, in part, as follows: "Said Board shall also have the right to acquire either by purchase, condemnation or other legal means all lands and water rights and other property necessary for the construction, use, supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful water, and all necessary appurtenances. In case of purchase, the bonds of the District hereinafter provided for may be used to their par value in payment."

No other method or purpose was provided in the statutes of the State at the time these bonds were sold, and it was then and is now expressly provided in Section 2392, Idaho Revised Codes, as follows: "The Board of Directors or other officers of the District shall have no power to incur any debt or liabil-

ity whatever, either by issuing bonds or otherwise, in excess of the express provisions of this Title, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void * * * .”

There is no Idaho case bearing directly on the point, but the numerous California cases construing almost identical sections of the Wright Act of California seem to be conclusive.

In *Hughson v. Crane* (Cal.) 47 Pac. 120-121, bonds had been issued directly in payment of the amount due on a construction contract, and also in payment of salaries and certain other obligations of the District. After referring to section 15 of the California Irrigation Act, which corresponds to Section 2396 of the Idaho Revised Codes and to Sections 16 and 12 of the California Act, corresponding respectively to Sections 2204 and 2386 of the Idaho Revised Codes, hereinbefore set forth, the Court say:

“These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value, or sell them for money in the open market, under the restrictions and limitations given in Section 16, at not less than 90 per cent of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the

right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by Section 16."

In *Stimson v. Alessandro Irr. District* (Cal.) 67 Pac. 496, bonds had been issued in exchange for rights to the use of water from a canal not owned by the district. These were held void.

In *Leeman v. Perris Irrigation District* (Cal.) 74 Pac. 24, bonds were issued in payment of maintenance or general expense warrants; and in *Ham v. Grapeland Irrigation District* (Cal.) 158 Pac. 207-210, they had been issued for groceries and supplies. In both cases the bonds were held void, as having been issued for a purpose and consideration other than the two limited and authorized by statute.

As to the bonds used for the payment of outstanding obligations of the Canyon Canal Company, it will be contended that this was a purchase of property. In reply, attention is called to the fact (as particularly set forth in the statement herein) that the entire property had been conveyed on August 15, 1911, to the District, on which day the District took possession, and has operated it ever since (Transcript pages 199-200), which was prior even to the time of making the Corkill contract. True, the District held the property subject to valid or legal claims against it, but it is no place shown that any of the claims for which these bonds were exchanged were legal or valid or that they constituted any lien upon the District's property. It is also submitted, assuming that

these claims were valid liens, that the payment thereof with bonds of the District after acquisition of title by the District, is not a purchase of property within the contemplation of the statutes and authorities cited.

As to the bonds delivered to Corkill & Company, which appellants claim were commission bonds, and nothing more, it will be contended that the consideration therefor was not the services of Corkill & Company, but the release of the Trowbridge & Niver unsecured claim, referred to in Section 2 of the contract (Transcript page 65). It is submitted that the contract will not bear this construction. This claim was to be released on deposit of the whole series of bonds with the depositary (Transcript page 65, Section 2), which was prior to the delivery of any bonds, and it is no place provided in the contract that any of the bonds were to be issued to any person in consideration of or in payment therefor. This claim is not even mentioned in the recitals of the contract (Transcript pages 61-64) specifying the obligations of the Canyon Canal Company for which bonds were to be exchanged.

If it were true, however, that this claim had been the actual consideration for the bonds issued to Corkill & Company, the objection that such bonds had been issued for an unlawful purpose would still remain, as the claim did not even purport to be a lien against the property of the District.

We submit that the contract is capable of only one construction in its application to this item of bonds, and that is that they were to be delivered to Corkill

& Company without consideration and as compensation for effecting the exchange of new bonds for the old issue and the sale for cash of the \$280,000.00 of bonds set aside to be sold only for cash at par.

This apparently is the construction placed upon the contract by Corkill & Company and by the Trustee, because immediately upon effecting the exchange the Trustee delivered to Corkill & Company approximately \$150,000.00 of the commission, or bonus, bonds (Trans. p. 154). Under the contract of September 12, 1912, the Trust officer of the Depositary, testified that Corkill & Company paid in \$30,000.00, but that the Trust Company actually delivered to him \$37,500.00 of the bonds (Trans. p. 157). There is no pretense that this excess of \$7500.00 had anything to do with procuring the title to any portion of the canal or works, or property of any description, or that the District received anything therefor, except the services of Corkill & Company in affecting the sale of \$30,000.00 par value of the bonds.

We think the contract should be given its plain manifest construction, and that is that the parties to it were trying to escape the plain provisions of the statute, which require that the bonds should only be sold at par and accrued interest, or exchanged for property upon the same basis. To place a different construction upon these provisions of the contract involves an extended journey into the realms of speculation, which we submit is not warranted when examining the contract in the light of the surroundings and conditions under which it was executed.

THE BONDS DO NOT MATURE AT THE PERIODS PRESCRIBED BY LAW.

Subdivision (c) of the fourth group of errors specified raises the contention that the bonds do not mature at the periods or intervals prescribed by law. Section 2397 of the Idaho Revised Codes, so far as the same is material here, provides:

“The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as eleven year bonds, twelve year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to-wit: At the expiration of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent: *Provided*, That such percentages may be changed sufficiently so that every bond shall be in an amount of one hundred dol-

lars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments. Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January first or July first next following the date of their authorization and they shall bear interest at a rate of not to exceed seven per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than one thousand dollars, and shall be signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which said bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds is insufficient for the completion of the plans and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessment therefor, in the manner hereinafter provided. * * * ”

It appears on the face of the bonds themselves (Transcript page 122), and by the testimony of

V. T. Craig (Transcript page 196), that the sixteen year bonds of this issue are \$10,000.00 short of the amount required by statute, and the twenty year bonds are \$10,000.00 in excess. This in effect extends the maturity of ten thousand dollars of the principal four years beyond the time designated by the statute for its payment and increases the amount of interest which must be paid \$2400.00 beyond the statutory limitation; yet these particular bonds, representing this increased interest, are declared valid by the decree herein, including the remaining \$175,000.00 represented by the same maturity and notwithstanding the fact that the \$10,000.00 excess issued for the twentieth maturity cannot in any way be distinguished from the \$175,000.00 which the law fixed as the maximum for such maturity.

It is also contended that the entire issue of bonds mature over a year prior to the time when they could lawfully do so under the statute. The bonds are all dated January 1, 1911, which is the proper date, as the foregoing Section 2397 of the Codes requires that they be dated on the first day of January following their authorization. It also requires, however, that the bonds mature, so many at the expiration of a certain period, "from each *issue*," and the word "*issue*" is defined in the preceding sentence of the same section (2397) as "the portion of the bonds of a series *sold* at any time." The negotiable instrument law of the State (Section 3648, Idaho Revised Codes) also provides: "Issue means the first delivery of an instrument complete in form to a person who takes it as a holder."

We submit that under these statutes the bonds were issued only when delivered by the depositary. But, assuming for the purpose of argument, that issue means delivery to the depositary rather than delivery to the actual purchaser, these bonds did not reach the depositary until January and February in the year 1912 (Tran. p. 127), which was over a year from their date, and as appears on the face of the bonds (Trans. p. 121) the maturities are all computed from the date of the bond thereby advancing the maturity of the whole issue a year under the period contemplated by statute.

The authorities are uniform that no municipal or public corporation has power to issue bonds payable at any time other than that fixed in the statute or ordinance by which the power to issue is delegated.

In *Wright v. East Riverside Irrigation District* (9 C. C. A.) 138 Fed. 313-322, bonds issued under the Wright Act of California were contested. The provisions of the Wright Act differed from those of the statutes of Idaho in that the California act required the bonds to be dated when issued, and the Idaho act requires them to be dated the 1st day of January or July following their authorization. And the California act only impliedly requires the maturities to date from the time of issuance. The Idaho statute requires this expressly. The bonds in that case bore date December 30, 1890. They were actually delivered on the 27th day of June, 1892. The court in its opinion, however, for the purpose of making the point, assume (p. 322) that the bonds were

“issued” at the latter date, namely, the date of their disposal, thereby making a case parallel to that at bar, and on that situation, say:

“They equally failed to conform to those other essential provisions of the statute declaring that they shall bear date at the time of their issue and be payable in installments at the various times therein fixed. In that view they are ante-dated, the direct and necessary effect of which is to make them payable within a shorter time than is provided by statute for their payment, which provision is, as a matter of course, of the essence of the law and not a matter of mere form. In either event and in both cases the purchaser was appraised by the face of the bond itself and the law under which it purported to be issued of its invalidity.”

In *Stowell v. Realto Irr. District* (Cal) 100 Pac. 248-251, the court say:

“The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. ‘There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability.’ *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005. Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (*People’s Bank v. School District*,

3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642) or a longer term (Norton v. Town of Dyersburg, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. Ed. 85; Barnum v. Okoloma, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495) than that authorized are invalid."

In *People's Bank v. School District No. 52*, 3 N. D. 496, 28 L. R. A. 642, it is said:

"It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may prescribe the conditions on which such power shall be exercised. It may also declare what terms shall be embodied in the bonds it authorizes to be issued. The donee of the power must take it burdened with all statutory requirements, as well as with respect to the terms of the bonds to be issued as with regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they 'may be made payable in not less than ten nor more than twenty years from their date.' The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore made payable in less than ten years from their date. We do not see how such a bond can be regarded as being authorized by the statute. There is no more power to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the mag-

nitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days, on what principle can we draw it, at thirty days, or six months, or a year? Authority to issue bonds payable in not less than ten years from date is not authority to issue them payable in less than ten years. There is an eminent authority in favor of this view. *Norton v. Dyersburg, Tenn.*, 127 U. S. 160, 32 L. Ed. 85; *Barnum v. Okolona*, 148 U. S. 398, 37 L. Ed. 495; *Brownell v. Greenwich*, 114 N. Y. 518, 4 L. R. A. 685; *Hoag v. Greenwich*, 133 N. Y. 152; *Potter v. Greenwich*, 92 N. Y. 663. In the case 148 U. S. and 37 L. Ed. the bonds were payable in from eleven to seventeen years from date. Under the statute the time of payment was not to extend beyond ten years from date. Therefore, as to some of the bonds, the violation of the statute was only to the extent of making them payable a year later than the statute prescribed; and yet these bonds were held void on this ground. The court did not indicate that the extent of the violation was at all material to the injury whether the law had been disregarded. Mr. Justice Shiras, in his opinion, says: 'Accordingly, if in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company, and to pay for the same by an issue of bonds, prescribed that

such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. * * * Our conclusion upon the whole case is that the town of Okolona had no power to issue the bonds in suit.' ”

In *Barnum v. Okolona*, 148 U. S. 393, 13 S. C. R. 638, it is said that if the legislature in authorizing the town of Okolona to subscribe for stock in a railway company and to pay for the same by a bond issue, “prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds.” Citing *Norton v. Dyersburg*, 127 U. S. 160, 8 S. C. R. 1111, and *Brenham v. Bank*, 144 U. S. 188, 12 S. C. R. 559.

In *Brenham v. Bank*, it is said after referring to the fact that the ordinance authorizing the bonds provided for redemption at any time after five years from date, and that the bonds were issued redeemable after ten years, “the officials of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption.”

It will be contended that the bonds are, nevertheless, valid in the hands of bona fide purchasers under the doctrine of estoppel by recital, even if they be invalid in the hands of others. Accepting the argument as to the Corkill commission bonds, it could, however, have no application to bonds exchanged for Canyon Canal obligations and still in

the hands of the original transferees. For, as stated in *Leeman v. Perris*, 74 Pac. 24-25, this principle (that of estoppel by recital) has no application where the purchaser has actual knowledge of a fact, which, taken in connection with the provisions of a statute which he is presumed to know, establishes the proposition that the statute has been violated.

Wright v. East Riverside Irr. Dist., 138 Fed. 313;

Anthony v. Jasper, 101 U. S. 693.

These transferees would therefore be charged with notice of the statutes of Idaho, both as to maturities of the bonds and as to the consideration for which they could be lawfully issued. As to the facts concerning the maturities, the bonds themselves bore date January 1st, 1911, and as the transferees received them direct from the depositary, not earlier than March, 1912 (p. 154 T.), they certainly knew that the maturities were not calculated from the date when they were issued and that they did not mature at periods required by law after issuance. As to the consideration, they certainly had knowledge as to what they were giving for them.

However, but little reliance can be placed on an argument in favor of the bona fide purchasers of the bonds, for the reason that no proof was offered whatsoever that any person other than the actual plaintiffs (excluding Thompson and Williams) were bona fide purchasers. And it was for the reason that the defendants wished to determine who were bona fide purchasers and who were not that the at-

tempt was made to have the other holders of bonds brought in as parties to the action.

DEFECT OF PARTIES.

Group two of the assignments of error, being specifications 6 to 11, inclusive, raises really two questions, much interwoven but distinct. The first is the refusal of the lower court to have additional parties brought in, pursuant to the plea of defect of parties in the answer (T. p. 56), and the motion made during the trial of the cause (Trans. pp. 186 and 210). The second is as to the validity of the decree adjudicating valid bonds and coupons held by persons not parties to the action. As to the first question, it is perhaps true that the other bondholders are not indispensable parties, but they are certainly necessary parties within the definition given in *State of California v. Southern Pacific Co.*, 157 U. S. 250, 39 L. Ed. 691, 15 S. C. R. 591:

“Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed ‘necessary parties’; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting others not before the court, the latter are not indispensable parties.”

Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825;

Simpkins Suit in Equity, pp. 230-234.

As such the court could proceed without joining them, saving their rights, but will not under the generally recognized rule.

In *State of California v. Southern Pacific Co.*, supra, the court quotes with approval from one Daniel Ch. Pl. & Prac., 4 Am. Ed., 190, as follows:

“‘It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.’”

Washington State Sugar Co. v. Sheppard, 186 Fed. 233-235.

Such is the evident intent of Equity Rule 39, saying:

“In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdic-

tion of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

None of the exceptions stated in the rule as ground for omitting parties exist here, at least as to the larger part of the outstanding bonds. The committee maintaining this suit has under its absolute control \$728,100.00 in amount (Tran. p. 185) of the total of \$879,600.00 outstanding (Trans. p. 128), under a bondholders' agreement vesting even title to the bonds in the Committee and authorizing suit in their absolute discretion (Trans. pp. 183-184). It further appears by the evidence submitted by the actual plaintiffs (other than Thompson and Williams who made no proofs) that the entire holdings represented by name in the suit aggregated but \$90,500.00, the following being a tabulation thereof:

Transcript

| <i>Name.</i> | <i>page.</i> | <i>Amount.</i> |
|------------------------------|--------------|----------------|
| Lincoln University | 161 | \$ 5,000.00 |
| Chester County Trust Co..... | 163 | 10,000.00 |
| F. W. Horton..... | 165 | 5,000.00 |
| National Bank of Oxford..... | 168 | 10,000.00 |
| Mary C. Waddell..... | 169 | 1,000.00 |
| Charlotte H. Shipman..... | 170 | 1,000.00 |
| S. H. Hudson..... | 171 | 2,000.00 |

| | | |
|------------------------|-----|--------------------|
| Helen M. Conrad..... | 172 | 2,000.00 |
| J. Willis Gardner..... | 174 | 7,000.00 |
| A. N. Gaebler..... | 177 | 47,500.00 |
| Total..... | | <u>\$90,500.00</u> |

It is apparent at a glance that the Committee used the names of but a few of the small holders, with the exception of the bonds belonging to Dr. Gaebler, a member of the Committee. It is of primary importance to the defendants in this suit to put the holder of bonds on his proof as to the conditions of his purchase and his standing as a bona fide holder. This can be done only by having them joined as parties. It is therefore submitted that the plaintiffs were entitled to the protection of having at least the other bondholders represented by the Committee joined in the action and that it was error for the court to proceed to decree without them.

This brings us to the second question, is the decree valid as to the bonds held by persons other than parties? It will be conceded, we think, that it is not, unless it can be sustained on the theory of representative or class suit, pursuant to the provisions of Equity Rule 38:

“When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”

One difficulty with this theory, however, is that the decree itself, (Trans. pp. 115-117) does not in terms purport to be such a decree. It is simply an adjudication that the bonds are valid, without reference to any holder, even the plaintiffs. But, assuming that such is the theory underlying it there are still a number of reasons why it should not be sustained.

One of them is the condition embodied in Equity Rule 38 itself, namely, that the persons constituting a class be so numerous as to make it impracticable to bring them all before the court, an exception that was thoroughly discussed by this court in *In re Dennett, et al*, 221 Fed., 350-355. As the evidence shows, it would have been anything but impracticable for the Committee to bring in at least the rest of the bonds held by themselves.

A second objection is that the suit is not brought by the plaintiffs in behalf of others similarly situated, but only in favor of all other holders of bonds of said district who may desire to join in this proceeding and pay their proper proportion of the costs herein (Trans. p. 24). There is neither allegation nor proof that there were any others *similarly* situated. Under such conditions, outstanding bondholders who did not connect themselves with the litigation in any way would certainly not be held to be bound by the decree were it adverse. It would seem to us to follow then that it could not be binding in their favor.

It is said by the Supreme Court of California in *Haese v. Heitzeg*, 114 Pac. 816-817:

“Where one plaintiff belonging to a numerous class, as creditors, bondholders, beneficiaries, and the like, brings an action in behalf of himself and all others similarly situated, the judgment which may be rendered is binding on others of the class who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment, or by acquiescing in it. But it can have no binding effect on those who do not participate in the proceeding, do not make proof of their claims, or otherwise join in it.” 23 Cyc. 1246; Pomeroy’s Remedies, Par. 400; *Ex parte Howard*, 9 Wall. 175, 19 L. ed. 634; *Holderman v. Hood*, 70 Kan. 267, 78 Pac. 838.”

Tobin v. Portland Flouring Mills Co., (Ore.)
68 Pac. 743;

Holderman v. Hood (Kan.) 78 Pac. 842;

Wabash Railway Co. v. College, 208 U. S. 38-
57, 52 L. Ed., 379-387;

Compton v. Jessup, 68 Fed., 263-285.

ARE THE PLAINTIFFS, THOMPSON AND WILLIAMS, ENTITLED TO A DECREE?

Group one of the specifications of error present the question as to whether or not the plaintiffs Thompson and Williams were entitled to any relief (Specifications 1-4, inclusive). As appears from the original bill, (T. p. 7) J. Paul Thompson instituted this suit originally as sole plaintiff. Henry M. Williams was later joined as party plaintiff by order

of the court (T. p. 81). No evidence whatever was introduced at the trial of the cause nor any admission made in support of the allegations of the bill as to either Thompson or Williams. Interrogatories for discovery were submitted to both plaintiffs under Equity Rule 58 on August 17, 1916 (T. pp. 91-95) and neither plaintiff made any response (T. p. 211). It is contended that neither of these parties are entitled to share the benefits of any favorable decree, under the doctrine of class representation, or otherwise.

First, because the rule permitting class representation by a few is founded on necessity, and the practice should never be permitted where the parties could be easily before the court in name. In *re Dennett*, 221 Fed. 350-355 *supra*.

And, secondly, these parties having refused to answer the interrogatories, the bill as to them should have been dismissed with prejudice under the provisions of Equity Rule 58: "Any party failing or refusing to comply with such an order shall be liable to attachment and shall also be liable if a plaintiff to have his bill dismissed."

It will be noted that the actual making of the order for the examination of the plaintiffs pursuant to the rule was waived by plaintiffs' counsel by stipulation. (T. p. 95.)

Certainly these two plaintiffs, having refused to answer the interrogatories, cannot in lieu of being dismissed pursuant to the rule, be permitted to retire into the position of quasi parties and claim the benefit of a favorable decree.

It is therefore submitted that the decree should be reversed.

Respectfully,

J. M. THOMPSON,

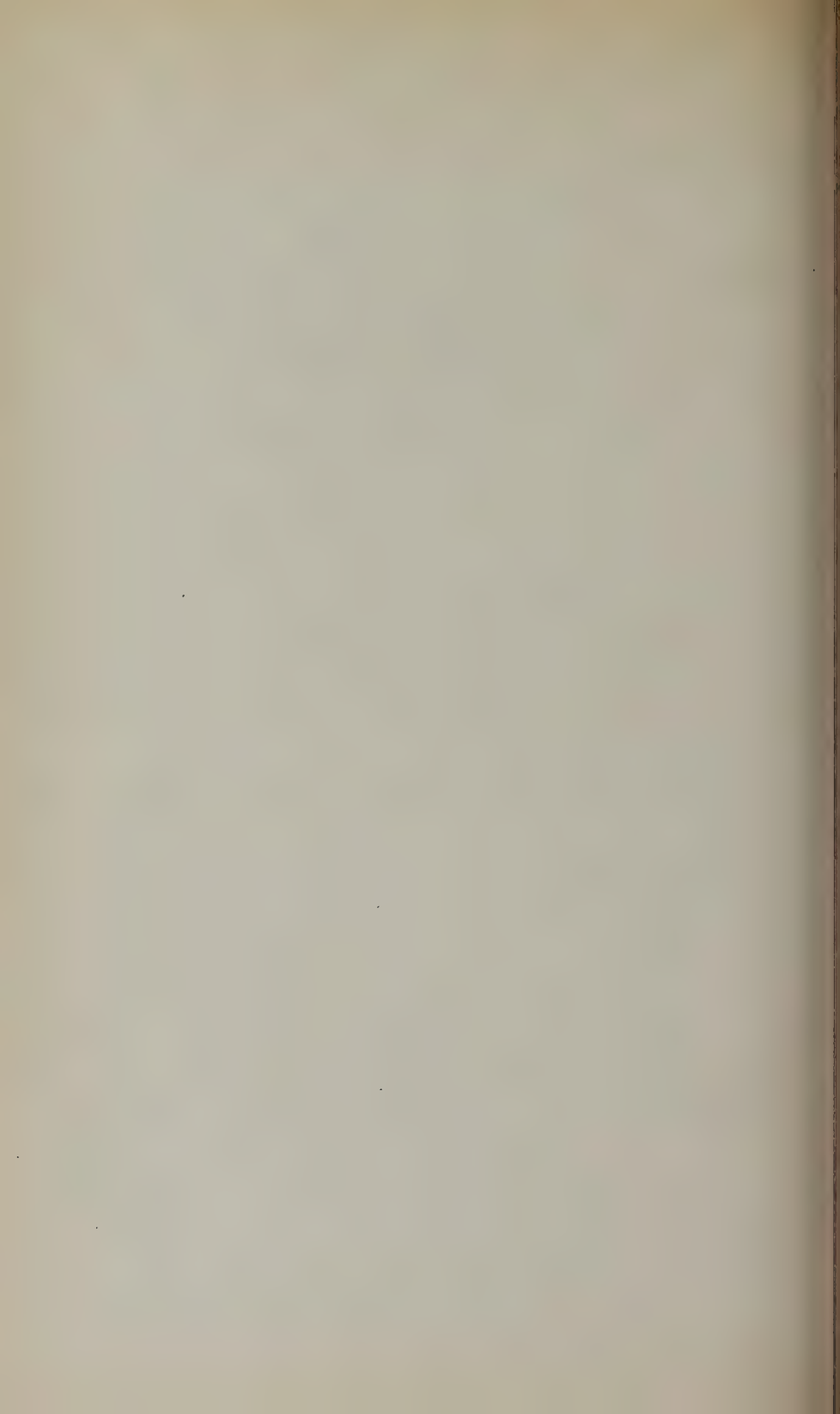
Residing at Caldwell, Idaho,

FREMONT WOOD and

DEAN DRISCOLL,

Residing at Boise, Idaho,

Solicitors for Appellants.



United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS as Directors, and R. B. SHAW as Treasurer of the Emmett Irrigation District,
Appellants,

vs.

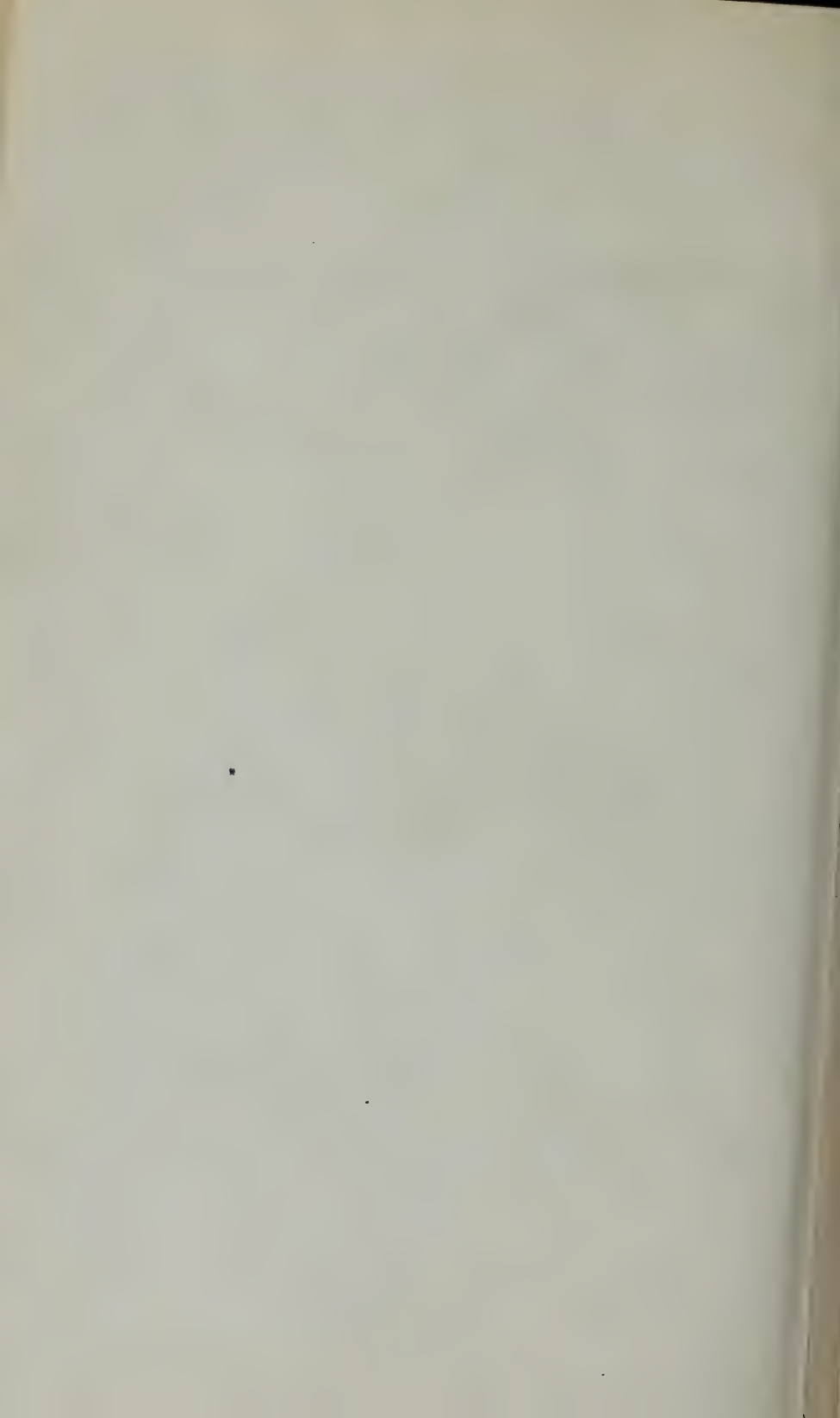
J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated,

Appellees.

BRIEF OF APPELLEES

On Appeal from the District Court of the United States, District of Idaho, Southern Division.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Appellees,
Residence: Boise, Idaho.



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STATEMENT OF THE CASE

The statement of the case as set forth in appellants' brief is substantially correct, and we shall confine our statement to a brief review of the controlling facts as they appear to us. For brevity we shall re-

fer to the appellant Emmett Irrigation District as simply the "District."

It is conceded that the District was organized in 1910 for the purpose of purchasing, holding and operating an extensive canal system constructed by the Canyon Canal Company, Limited, under a contract with the State of Idaho and the Act of Congress commonly known as the Carey Act. The District planned to make certain improvements on and enlargements and extensions of the system. Immediately after its organization it authorized an issue of bonds to the amount of \$1,100,000.00. With these bonds, or the proceeds thereof in the event of sale, it proposed to acquire the canals, irrigation works and water rights of the Canyon Canal Company and make the desired improvements and extensions.

In accordance with the provisions of the Idaho Statutes and in order to enhance the market value of its bonds by removing all doubt as to their validity, the District instituted proceedings in the State courts to have it judicially determined and decreed that it had been legally organized, that the bonds had been properly authorized and would in the hands of the purchasers, be legal and valid obligations of the District. These confirmation proceedings were carried to the Supreme Court of the State, and the decision of that court, approving all the proceedings of the District relative to its organization and the issuance of its bonds, is reported under the title of *Emmett Irrigation District vs. Shane*, 19 Ida. 332, 113 Pac. 444.

The District offered its bonds for sale and gave public notice requesting bids, but no bids were received (Record, p. 119). Some seven months later negotiations for the purchase of the canal system were taken up with Corkill & Company, dealers in municipal bonds, of the city of Chicago, who were seemingly in a position to effect a deal through their relation with the Canyon Canal Company and its creditors and the holders of its securities. The record shows that the Canyon Canal Company had sold water rights in the irrigation system under contracts of sale on which there was payable to the Company upwards of \$600,000.00 in deferred payments. These contracts were a lien upon the land of the settlers who had purchased water rights and also upon the water rights sold and the interest of the settlers in the canal system. The Canyon Canal Company had in turn issued bonds, notes and other obligations and secured the payment thereof by a Trust Deed or Mortgage on the irrigation system and water rights, and as additional security had deposited the water contracts referred to with the Trustee under such Trust Deed,—The American Trust & Savings Bank of Chicago. Some of the obligations of the Canyon Canal Company were due, and on others there was default in the payment of interest, and foreclosure of the mortgages on the irrigation system with the delay and expense incident to such litigation confronted both the Canal Company and the District.

To accomplish the immediate transfer of the irrigation system and appurtenant water rights to the

Irrigation District, free and clear of the mortgages, trust deeds, liens and encumbrances created by the Canyon Canal Company, a contract was entered into on September 12, 1911 (Record, pp. 60-77) with Corkill & Company, wherein and whereby the District agreed to pay for such irrigation system, free and clear of encumbrances, \$820,000.00 in bonds at par, the remainder of the issue—\$280,000.00—Corkill & Company agreed to sell at par and the proceeds of which the District proposed to use for needed improvements, enlargements and extensions of the irrigation system.

It is admitted that the District received what it bargained for, except that Corkill & Company did not sell the entire \$280,000.00 of bonds, but actually sold \$125,000.00 of bonds at par and turned the money over to the District. The contract with Corkill provided that \$220,000.00 of the \$820,000.00 of bonds to be issued for the irrigation system and water rights should be deposited with the Fort Dearborn Trust & Savings Bank of Chicago and delivered in installments as he succeeded in carrying out his part of the agreement, viz., when he had delivered title to the system free and clear of encumbrances, \$150,000.00 of the \$220,000.00 of bonds should be delivered; the balance should be delivered pro rata as he sold the \$280,000.00 of bonds to be sold at par for improvements and extensions. Under the contract referred to the irrigation system and water rights were conveyed to the District free and clear of encumbrances, and the District has been in

the possession and had the use and enjoyment of all the property for more than six years. But instead of receiving \$280,000.00 for improvements the District actually received \$125,000.00 in cash for the bonds that were sold, and it has left in its treasury not \$155,000.00 of bonds, but \$202,400.00 of bonds, including the bonds forfeited by Corkill & Company when they were unable to carry out their contract. The District is consequently \$47,400.00 better off than if Corkill & Company had fully carried out their contract.

On September 12, 1912, (Record, pp. 131-139) and again on April 5, 1913, (Record, pp. 139-148) the District and Corkill & Company entered into new contracts ratifying and affirming what had been done under the first contract and making new provisions for the sale of the remaining bonds. Under each of these contracts bonds were sold by Corkill & Company and delivered by the District. (Rec. pp. 130, 150, 156-7.) In the last contract each released the other from all claims and damages of whatsoever kind for default or failure to fully carry out the contract of September 12, 1911. (Rec. p. 146.)

The benefits received by the land owners from the acquisition of the irrigation system and the issuance of the bonds were apportioned by the District and confirmed by the Court in June, 1913, (Rec. pp. 180-181), and, based on these benefits, the District Board in October, 1913, levied a tax for the payment of interest on the bonds. But only a small part of the tax was actually collected. At the time of the

trial the Treasurer had on hand in the Interest Fund about \$8,000.00 with which to pay about \$55,000.00 of interest coupons maturing January 1st and July 1st, 1914. (Rec. p. 157.) In June, 1912, the people voted a special tax to pay the interest maturing July 1st, 1912, (Rec. pp. 207-8), but after authority to levy the tax had been received the District raised the money by transferring funds from another account.

The money collected under the tax levy made in 1913 has not been applied to the payment of interest, (Rec. p. 157) and the Bill alleges that it is the purpose of the District to repudiate its bonds and divert the money in the Interest Fund to other purposes; that the conduct of the District has cast a cloud upon the validity of the outstanding bonds, and it is impossible for anyone to determine what bonds the District contends are valid, if any, and what bonds are void; that because of the contention that a part of the bonds were issued without consideration or any adequate or sufficient consideration, coupled with the further statement that the District kept no record of its bond sales and does not know which of its bonds were so issued without sufficient consideration or any consideration, and that it is impossible for the District to identify the bonds that were used for the purchase of canals and irrigation works from those that were actually sold for cash, a cloud has been cast upon the validity of all the outstanding bonds, destroying their market value, and in order for the bondholders to have full and ade-

quate relief the court must ascertain and determine what bonds, if any, have been illegally issued and are void and should be cancelled and not be permitted to share in the Interest Fund on hand or in the future funds raised for the payment of interest and principal on the legally issued bonds of the District, and until the validity of all the bonds has been ascertained the District refuses to levy the necessary interest tax.

The case first came before this Court in 1915 on the appeal of the bondholders from an order dismissing the Bill and sustaining a motion of the District that the Bill did not state a case for equitable relief. The decision on that appeal (*Thompson vs. Emmett Irrigation District*, 227 Fed. 560, 142 C. C. A. 192) disposes of most, if not all, of the questions raised on this appeal. This court held that it was a class suit, that the Bondholders were entitled to the relief demanded, if the facts were as alleged in the Bill, and that it was a suit that came clearly within the jurisdiction of a court of equity. The case was sent back for trial, and upon the trial of the case the facts were established substantially as alleged in the Bill and the trial court found in favor of the appellees on every issue and granted relief in accordance with the views expressed by this court in its decision on the former appeal. (See decision of Trial Court, Record, pp. 95-114.)

From that decision appellants have appealed, raising again many of the questions that were decided adversely to them on the former appeal.

BRIEF OF THE ARGUMENT.

The Former Decision Is the Law of the Case.

None of the questions which were before this court on the first appeal can be reheard or examined upon the second appeal. The former decision is now the *law of the case*.

Roberts vs. Cooper, 20 How. 467, 15 L. Ed. 969.

Sizer vs. Many, 16 How. 98, 14 L. Ed. 862.

Empire State-Idaho Min. & Dev. Co. v. Hanley, 136 Fed. 99, 69 C. C. A. 87.

Montana Min. Co. v. St. Louis, etc. Co., 147 Fed. 897, 78 C. C. A. 33.

It Is a Class Suit.

Where the parties interested in the suit are numerous their rights and liabilities are so subject to change and fluctuation by death, or otherwise, that a court of equity for convenience and to prevent a failure of justice will permit a portion of the parties in interest to represent the entire body, and the decree binds all the parties to the same extent as if they were all before the court.

Smith vs. Swormstedt, 16 How. 288, 14 L. Ed. 942.

Hartford Life Ins. Co. vs. Ibs, 237 U. S. 672, 59 L. Ed. 1169.

Wallace vs. Adams, 204 U. S. 425, 51 L. Ed. 552.

Beatty v. Kurtz, 2 Pet. 556, 7 L. Ed. 521.

United States v. Old Settlers, 148 U. S. 227, 37 L. Ed. 509.

Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.
Galveston R. R. Co. v. Cowdrey, 11 Wall. 459,
20 L. Ed. 199.

Wabash & Erie Canal Co. v. Beers, 2 Black
448, 17 L. Ed. 227.

Johnson v. Watters, 111 U. S. 640, 28 L. Ed.
547.

Harmon v. Auditor of Public Accounts, 123
Ill. 122, 5 Am. St. Rep. 502.

Watson v. National Life & Trust Co., 162
Fed. 7, 88 C. C. A. 380.

Merchants & Manufacturers Traffic Assn.
vs. United States, 231 Fed. 292.

Simpkins, Fed. Eq. Suit, (3d Ed.) p. 238.

Street, Fed. Eq. Pr., Vol. 1, Secs. 539-553.

Equity Rule No. 38.

*The Idaho Irrigation District Law Must Be Liber-
ally Construed.*

The statutes of Idaho expressly require that courts
in construing the irrigation district law "shall dis-
regard every error, irregularity or omission which
does not affect the substantial rights of any party."

Sec. 2403, Idaho Revised Codes.

Emmett Irrigation Dist. v. Shane, 19 Ida.
332, 113 Pac. 444.

Nampa & Mer. Irri. Dist. vs. Brose, 11 Ida.
474, 83 Pac. 499.

*The Laws of Idaho Contemplate That Irrigation
District Bonds Shall Not Be Subject to Attack
In the Hands of the Public.*

The Legislature, in providing for the confirma-
tion by the courts of the proceedings of an irrigation

district relative to its organization and the issuance of bonds, intended that all questions with reference to the validity of its bonds should be determined before they were actually issued, so as to remove all doubt as to their validity and thereby enhance their market value.

Nampa & Mer. Irr. Dist. v. Brose, 11 Ida. 474, 485.

Progressive Irr. Dist. v. Anderson, 19 Ida. 504, 512, 114 Pac. 16, 18.

In the State of Idaho the rule of estoppel is rigidly enforced in favor of holders of bonds of irrigation districts, where the district has received and retains the benefits for which it bargained, and the bonds will not be annulled or declared void because of irregularities in the manner of disposing of the bonds by the District or in the clerical work of issuing the same.

Page v. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Date of Issue Fixed by Statute.

The Idaho law arbitrarily fixes the date of the bonds and coupons and provides that "the portion of the bonds of a series sold at any time shall be designated as an *issue*, and each issue shall be numbered in its order," and that they shall mature serially after the eleventh year; and in this case the bonds were properly dated January 1, 1911, and their maturities are properly fixed with reference to that date.

Idaho Revised Codes, Sec. 2397.

Yesler vs. City of Seattle, 1 Wash. 308, 25 Pac. 1014.

O'Neill vs. Yellowstone Irr. Dist., 44 Mont. 292, 121 Pac. 283.

Page vs. Oneida Irrigation District, *supra*.

The Idaho Statutes, unlike the California Statutes, specifically provide that the bonds must be dated on January first or July first following the date of their authorization by the voters of the District; and the word "issue" as used in Section 2397 of the Idaho Revised Codes is used as a substantive or noun and means the block of bonds which the district has determined to offer for sale at one time, and its meaning in the Idaho Statutes is widely different from that of the verb "issue" used in the California Statutes, which refers to the actual sale and delivery of the bonds by the district.

Section 2397, Idaho Revised Codes.

The Board of Directors Has Broad Powers in the Purchase of Property.

Irrigation Districts are expressly authorized to acquire, by purchase or other legal means, "all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement" of the necessary canals and irrigation works, "including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful wa-

ters, and all necessary appurtenances." And "in case of purchase, bonds of the district * * * may be used to their par value in payment."

Idaho Revised Codes, Sections 2386, 2422.

Section 2386, Idaho Revised Codes, expressly provides that "said board (directors) shall have the power to manage and conduct the business and affairs of the district." And Section 2422 expressly provides that "said irrigation districts shall have the right by and through their boards of directors to acquire by purchase or other legal means, any or all of the property mentioned and referred to in this section."

The board of directors of an irrigation district is clothed by the statute with a wide discretion as to the manner in which the business of the district shall be managed and water acquired for the reclamation of the lands in the district, and the courts will not be warranted in interfering with that discretion on any mere question of good business policy. Nothing short of a gross abuse of power will warrant such interference.

Hanson vs. Kittitas Reclamation Dist., 75 Wash. 342, 134 Pac. 1083.

Contracts Should be Given the Construction That Will Render Them Valid.

Where the directors have acted within the scope of their authority and purchased property and obtained the cancellation and surrender of liens and encumbrances against the same, using their own

bonds at par in paying for such property, and are retaining, using and enjoying the benefits from such property and not offering to restore it, and it being impossible to put the former mortgagees and lien holders in *statu quo*, or restore them to any of their previous rights, courts will not be astute to find some pretext or technicality for invalidating the bonds of the district. In such cases the contract, if susceptible of two constructions, will be given the construction which renders the transaction legal and valid.

The fact that the present Board of Directors may believe that its predecessors made an unwise bargain does not invalidate the transaction or render the bonds of the district subject to attack, either in the hands of innocent holders for value or in the hands of those who purchased with entire knowledge of the transaction, which in itself was free from fraud and unfair dealing and well within the power of the Board of Directors of irrigation districts under the Idaho Statutes.

The District only agreed to purchase the irrigation system and water rights of the Canyon Canal Company free and clear of the then outstanding mortgages, liens and encumbrances of that company, and the fact that the Canal Company, before it could close the transaction and comply with the contract, submitted to its own bondholders and creditors a proposition to pay its own obligations in District bonds at par in no sense constitutes an exchange by the District of its bonds for Canal Company bonds. (See Rec. p. 152.)

Kinkade vs. Witherop, 29 Wash. 10, 69 Pac. 399.

Page vs. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Washington - Oreg. Corp. vs. Chehalis (Wash.), 136 Pac. 681.

The Bonds Need Not be Signed by the Officers in Office When Bonds are Delivered

The Idaho statutes do not require that irrigation district bonds must be signed by the officers in office at the time the bonds are actually delivered to the purchaser. It is sufficient that they are signed by the officers in office at the time of their date, and who held such office at the time they actually signed the bonds and when the contract for sale was made.

Page vs. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Town of Weyauwega vs. Ayling, 99 U. S. 112, 25 L. Ed. 470.

O'Neill vs. Yellowstone Irr. Dist., 44 Mont. 292, 121 Pac. 283.

The Later Officers Ratified the Action of Their Predecessors in Executing the Bonds.

The delivery of the bonds by the new officers and the subsequent contracts that were entered into for their sale by the new officers, and under which many of the bonds were sold, constitute a ratification of their execution by the former officers, and the later officers are estopped from questioning their execution.

Cases cited *supra*.

The Statute Requiring a Record to be Kept of Bond Sales is Directory.

The provisions of the statutes that "the secretary and treasurer shall each cause a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser" are directory and the failure of such officers to keep the record required does not affect the validity of the bonds.

Rondot vs. Rogers Township, 99 Fed. 202, 39 C. C. A. 462.

Bank vs. Dandridge, 12 Wheat. 64, 6 L. Ed. 552.

1 Dillon, Municipal Corporations, Sec. 300.

Rock Creek vs. Strong, 96 U. S. 271, 24 L. Ed. 815.

Abbott on Public Securities, p. 736.

Board of Commissioners vs. Vandriss, 115 Fed. 866, 53 C. C. A. 192.

Singer Mfg. Co. v. Elizabeth, 42 N. J. L. 249.

S. St. Paul vs. Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585.

Dows vs. Town of Elmwood, 34 Fed. 114.

Lyons vs. Lyons Nat. Bank, 4 Fed. 369.

The Officers are the Agents of the Municipality.

Public officials are the agents of the municipality and not of the purchasers of its securities, and if there has been misconduct on the part of the officials the municipality, rather than a stranger, must bear the consequences.

Town of East Lincoln vs. Davenport, 94 U. S. 801, 24 L. Ed. 322.

Warren vs. Marcy, 97 U. S. 96, 24 L. Ed. 977.

Davies vs. Huidekoper, 98 U. S. 98, 25 L. Ed. 112.

Hackett vs. Ottawa, 99 U. S. 86, 25 L. Ed. 363.

The Bondholders are Entitled to the Benefit of the Presumptions That Attach to Commercial Paper.

The Idaho statutes expressly require that irrigation district bonds shall be negotiable in form, and the provisions of the statutes for obtaining the judgment of the Supreme Court of the State as to their legality before they are sold to the public show clearly the intention to invest such bonds with all the privileges and immunities that the law accords to commercial paper.

The holder of commercial paper, in the absence of proof to the contrary, *is presumed to have taken it underdue, for a valuable consideration and without notice of any objection to which it was liable.*

San Antonio vs. Mehaffy, 96 U. S. 312, 24 L. Ed. 816.

Lampasas v. Talcott, 36 C. C. A. 318, 94 Fed. 457.

Pickens Twp. v. Post, 41 C. C. A. 1, 99 Fed. 659.

First National Bank v. Moore, 78 C. C. A. 581, 148 Fed. 953.

Swift v. Tyson, 16 Peters 1, 10 L. Ed. 865.

Idaho Rev. Codes, Sec. 3516.

Possession, even without explanation, is *prima facie* evidence that the holder is the proper owner or lawful possessor of the instrument; and the settled rule is, that nothing short of fraud—not even gross negligence—is sufficient to overcome the presumption and invalidate the title of the holder as inferred from his actual custody of the instrument.

Commrs. Marion Co. vs. Clark, 94 U. S. 278,
24 L. Ed. 59.

Before proof impeaching *bona fides* can be introduced it must first be shown that plaintiff had knowledge of the facts.

Pickens Twp. vs. Post, 99 Fed. 659, 41 C. C.
A. 1.

In the Federal courts it may now be considered as the settled rule that a person who takes negotiable paper before maturity for value is entitled to recover as against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid as against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith lies on the defendant.

First Nat. Bank vs. Moore (9th C. C. A.) 148
Fed. 953, 78 C. C. A. 581.

Young vs. Lowry, (3d C. C. A.) 192 Fed. 825,
113 C. C. A. 149.

“In an action by an endorsee upon a negotiable instrument vitiated by fraud in its inception or issued without consideration, the plain-

tiff, to prevail, must prove affirmatively that he paid value. That fact being established, he will be entitled to recover unless it is proved that he purchased with actual knowledge of the defective title, or in bad faith, implying guilty knowledge, or wilful ignorance. Circumstances which presumably would put a prudent buyer on inquiry are not enough, but to defeat an action by an endorsee of negotiable paper who obtained it in due course of business, before its maturity, and paid value for it, actual knowledge of facts sufficient to constitute a valid defense, if the action were prosecuted by the *mala fide* indorser, must be proved affirmatively."

Amalgamated Sugar Co. v. U. S. Nat. Bank,
(9th C. C. A.) 187 Fed. 746, 109 C. C. A.
494.

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of a circumstance which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in

possession. Such is the settled law of this court, and we feel no disposition to depart from it."

Murray vs. Lardner, 2 Wall. 110, 17 L. Ed. 857.

Winter vs. Nobs, 19 Ida. 18, 112 Pac. 525.

Vaughn vs. Johnson, 20 Ida. 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816.

Bison State Bank vs. Billington, 228 Fed. 116.

Idaho Rev. Codes, Secs. 3512, 3513, 3516.

Negotiable Instruments Law, Secs. 55, 56, 59.

The State of Idaho has adopted the uniform negotiable instruments law, and the bonds in question and the holders thereof are entitled to the advantages and immunities given to commercial paper and the holders thereof by that law.

Idaho Rev. Codes, Secs. 3458 to 3653, inclusive.

Under the negotiable instruments law, as adopted by the State of Idaho prior to the authorization of the bonds in question, "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration," and "Value is any consideration sufficient to support a simple contract;" and "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." And "Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise."

“To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge of the infirmity or defect*, or knowledge of such facts that his action in taking the instrument amounted to bad faith.”

Idaho Rev. Codes, Sec. 3513.

The District is Estopped by its Conduct and the Recitals in the Bonds.

The doctrine of equitable estoppel is freely applied in the enforcement of public obligations. It is denied only in cases where non-existence of the power to issue is shown; and a municipality will not be permitted to retain the benefits of the bargain and repudiate its obligations on the ground of unimportant irregularities in the form of its proceedings.

Abbott on Public Securities, Secs. 318-320.

Harris on Law of Municipal Bonds, p. 166.

Marshall County vs. Schenck, 5 Wall. 772,
18 L. Ed. 556.

The bonds recite that they have been issued under the Act relating to irrigation districts, and that all things required by law “precedent to and in the issue and delivery of this bond have been done, have happened and have been performed.” Such recitals will not be lightly set aside.

“The provision in the statute, that the bonds shall express on their face that they were issued by authority of the act, stating its title and date of approval, was evidently for the purpose of

giving them greater negotiability. A recital as directed by the statute, that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand. * * * Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that, in an action brought by a *bona fide* holder, the municipality is estopped from showing the contrary."

Tulare Irr. Dist. vs. Shepard, 185 U. S. 1.
46 L. Ed. 773.

Shelton vs. Gas Securities Co. (8th C. C. A.)
239 Fed. 653, 152 C. C. A. 487.

Waite vs. Santa Cruz, 184 U. S. 302, 46 L.
Ed. 552.

Stanley County vs. Coler, 190 U. S. 437, 47 L.
Ed. 1126.

Evansville vs. Dennett, 161 U. S. 434, 40
L. Ed. 760.

Quinlan vs. Greene County, 205 U. S. 410, 51 L. Ed. 860.

Presidio vs. Noel-Young Bond & Stock Co., 212 U. S. 58, 53 L. Ed. 402.

Provident Life & Trust Co. vs. Mercer County, 170 U. S. 593, 42 L. Ed. 1156.

Andes vs. Eli, 158 U. S. 312, 39 L. Ed. 996.

Town of Newbern vs. National Bank of Barnesville, 234 Fed. 209, 148 C. C. A. 111.

Town of Aurora vs. Gates (8th C. C. A.) 208 Fed. 101, 125 C. C. A. 316.

Hughes County vs. Livingston (8th C. C. A.) 104 Fed. 306, 43 C. C. A. 541.

Fairfield vs. Royal Ind. School Dist., (8th C. C. A.) 116 Fed. 838, 54 C. C. A. 342, 187 U. S. 643.

ARGUMENT.

The decision of this Court on the first appeal in this case (227 Fed. 560, 142 C. C. A. 192) is the law of the case and is sufficient answer to most of the assignments of error urged by appellants. This Court held that appellees (plaintiffs below) were entitled to equitable relief as prayed for, if the facts were as alleged in the Bill. The trial court has now found the facts as alleged, and it is conceded by appellants that the facts are not in dispute. The decision of the trial court is also sustained by the decision of the Idaho Supreme Court in the case of Page vs. Oneida Irrigation District, 26 Ida. 108, 141 Pac. 238, a case covering all the questions raised by appellants about

the issuance, signature and sale of the bonds, and many others far more important than any that have been urged in this case.

When the decisions referred to above are examined and the recitals in the bonds are considered the decision of the trial court must be affirmed. We shall consider first the question of parties.

Parties.

This question, we submit, was entirely disposed of by the former appeal where that question was fully considered. At that time only one bondholder was plaintiff. Since then ten other bondholders have been permitted to intervene and join the original plaintiff in the prosecution of the suit. The case is clearly the kind of case that Equity Rule No. 38 was intended to cover. The record shows (Record, p. 182) that there are between 250 and 300 bondholders widely scattered, holding in the aggregate \$897,-600.00 of bonds, and that until the validity of all the bonds are established the *pro rata* or proportionate share of each bondholder in the Interest Fund on hand cannot be determined, as the fund is insufficient to pay all the interest coupons in full; and the cloud which now hangs over all the bonds, destroying their market value and rendering it impossible to say which bonds are valid and which are invalid, cannot be removed except by a decree such as was entered in this case.

It is manifestly impossible to bring all the bondholders into court. To apply such a rule would be to

deny the bondholders any relief and permit the District to entirely escape the payment of its just obligations.

Counsel for appellants has erroneously assumed throughout his brief that only the plaintiffs who are actual parties to the suit are bound by the decree and that it does not bind the *quasi* parties or other members of the class. Such is not the law.

Probably the leading case of a true class suit is *Smith vs. Swormstedt*, 16 How. 288, 14 L. Ed. 942. The Methodist Episcopal Church had been divided into two branches and the action was brought by certain persons as plaintiffs in behalf of themselves and many others of the southern branch of the Church to establish their right to an interest in a trust fund for the benefit of superannuated preachers. A few defendants were named as representatives of the members of the other branch. The bill was objected to for want of proper parties, and in overruling the objection, the Supreme Court said:

“Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. *For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were*

before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

“The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them; or if ascertained, from the changes constantly occurring by death or otherwise.” (Our italics.)

See also:

Hartford Ins. Co. vs. Ibs, 237 U. S. 672; 59 L. Ed. 1169.

Beatty vs. Kurtz, 2 Pet. 566, 7 L. Ed. 521.

U. S. vs. Old Settlers, 148 U. S. 227, 37 L. Ed. 509.

Mason vs. York etc. R. R. Co., 52 Me. 109.

Another case illustrating clearly the application of this rule is that of Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 483, 20 L. Ed. 199, 205. The action was brought by certain bondholders in behalf of themselves and all other bondholders for foreclos-

ure of all the bonds under three successive mortgages creating liens of different priorities, and involving the question as to whether the bondholders were in fact holders in due course. The observations of the court in that case are particularly pertinent here, and we quote at some length from the decision:

“But it is objected that the complainants are not *bona fide* holders of the bonds in their possession; that many of the bonds were issued improvidently, and against stipulations contained in the mortgages, to the effect that they should only be issued to retire the previous issue of bonds. If this were true with regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question: what particular bonds were wrongfully issued, if a material question, is properly examinable in the master’s office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit; and this benefit will not be confined to the complainants’ bonds, but will be extended to all bonds that may be presented by other holders. But it does not appear, so far as we have been able to scrutinize the evidence that the complainants are not *bona fide* holders of their bonds. They have been examined, and have produced their bonds, and have told how they procured them, (namely: by purchase), and

what they gave for them; and they allege that they purchased them in good faith in the open market, supposing them to be valid obligations of the Company, and being told that they were. If such is the fact, and no proof to the contrary occurs to us, we do not see why the complainants must not be held to be *bona fide* holders for value of the said bonds.

“The next objection we shall notice is, that the complainants have no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages, because the interests of these classes are antagonistic to each other. They are no more antagonistic to each other than the several bondholders of the same class are. It is the interest of each bondholder to have as few prior claims to his, and as few participants with him as possible. Every co-bondholder is, in one sense, an antagonist. But the objection is entirely without foundation. The complainants do, in fact, hold bonds of the three different classes, and they have a perfect right to state that fact in their bill, and to pray relief suitable to the fact, and no possible harm or inconvenience can arise in their suing in behalf of themselves and all other bondholders in each class according to their several priorities. If any class of bondholders wish to contest the precedency of a prior mortgage, they have a perfect right to intervene in the suit and file a cross-bill setting up the

matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. Any bondholder proving his claim may contest the claim of any other bondholder. It has even been held that a mortgagee may sue on behalf of himself and all other creditors, notwithstanding he claims a right to prior satisfaction out of the mortgaged property. See Story Eq. Pl., Secs. 101, 158. And Judge Story says that, on principle, it is not easy to see why it might not be sufficient, in a suit by incumbrancers, to file the bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties to the extent of asserting their own rights, or of enabling them to contest the matter before a master. He says that this seems to be the true doctrine inculcated by the more recent authorities. Story Eq. Pl. 158; Eq. Jur., Sec. 549. But the case before us is much stronger than this. The complainants must set out their own claims under the different mortgages, and it would be impossible to make all the bondholders of either class parties, for they could not be discovered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable."

In Harmon vs. Auditor of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502, 506, certain taxpayers and property owners had filed a bill in equity as a class suit to enjoin the collection of taxes for the payment of bonds issued by the town of Mount Morris. A later action was begun for the same purpose by other taxpayers not actual parties on the record in the former suit, and the court held that the taxpayers bringing the second suit were members of the class and were bound by an adverse decree in the first suit. The court said:

“The present suit was begun by Harmon and others, also taxpayers and property owners of the town, as representatives of the same class, for whose benefit the Pinckney bill was filed. The complainants in this proceeding were represented by the complainants in the former suit, and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and in the pursuit of that remedy individuals have the right to represent the class to which they belong. This jurisdiction, in some respects, rests on the principles of a proceeding *in rem*.

“We therefore think that there is sufficient identity between the parties filing the present bill and those who filed the bill in the Pinckney case to justify the pleading of the decree entered there as *res judicata* in this case. The views

here expressed are sustained by the following authorities: *State v. C. & L. R. R. Co.*, 13 S. C. 290; *Terry v. Town of Waterbury*, 35 Conn. 526; *Sabin v. Sherman*, 28 Kan. 289; *Smith v. Swormstedt*, 16 How. 303."

Additional authorities are cited in support of this point in the Brief of the Argument, and we deem it unnecessary to further extend the discussion here. But these questions would seem to be *res judicata*, or in any event finally determined by the decision of this court on the first appeal. Every point made as to parties or the sufficiency of the Bill or the form of the bonds was concluded by that decision.

"It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort of the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members,"

said the Supreme Court of the United States in *Roberts vs. Cooper*, 20 How. 467, 15 L. Ed. 969.

The Bondholders' Committee for obvious reasons elected to confine its support or relation to the suit, to the payment of the expenses, and insisted that the individual bondholders should be responsible for their own proof and for that reason the suit was carried on in the name of the bondholders themselves, as was expressly authorized in the bondholders' agreement (Rec. p. 185). Had the Committee been the actual plaintiff, it would have been under the same handicaps and embarrassments as the bondholders under a rule requiring all the bondholders to join in the suit; besides the Committee is representing a body constantly changing as the certificates of deposit or bonds are sold or transferred either by operation of law or voluntary transfers.

Date of Issue

Counsel for appellants concede that the Idaho statutes are so radically different from the California statutes and the original Wright Act that the decisions of the California courts and in *Wright vs. East Riverside Irrigation District* (9th C. C. A.) 138 Fed. 313, are not in point (p. 34, Appellants' Brief).

The California statutes before this court in *Wright vs. East Riverside Irrigation District* *supra*, and before the Supreme Court of California in the many cases that have come before that court involving irrigation district bonds, did not fix the date of the bonds as of January first or July first following the date of their authorization, as does the Idaho

law. Neither did it provide for "series" or "issues," but it provided that "they (the bonds) shall be numbered consecutively *as issued*, and *bear date at the time of their issue*," which clearly contemplated, as held by the courts, that the bonds should be dated at the time they are issued or delivered to the purchaser, and should bear interest from the time of sale and mature with reference to that date. But the Idaho law was drawn upon an entirely different theory. It fixes an arbitrary date for the bonds and it contemplates that they shall bear interest and mature with reference to that date so as to give order, system and uniformity to the financial affairs of irrigation districts and harmonize the date of payment of bonds and interest with the date for the payment of taxes.

Section 2397 of the Idaho Revised Codes, insofar as it has any bearing upon the question involved, reads as follows:

"The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as eleven year bonds, twelve year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to-wit: At the expira-

tion of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent: Provided, That such percentages may be changed sufficiently so that every bond shall be in amount of one hundred dollars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments. Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January first or July first next following the date of their authorization and they shall bear interest at a rate of not to exceed seven per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than one thousand dollars, and shall be signed by the president and secretary, and the seal of the board of directors shall be

affixed thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which such bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds be insufficient for the completion of the plans and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessment therefor, in the manner hereinafter provided."

In the case at bar, the Emmett District proposed to sell all its bonds at one time, and it therefore designated them as "first issue." That the legislature contemplated that bonds would be dated sometime prior to their sale, or before they were actually "issued," is apparent from other provisions of the statutes providing that the district cannot sell the bonds at less than par "*and accrued interest.*"

Section 2404, Revised Codes, provides that:

"Before making any sale the board shall, by resolution, declare its intention to sell a specified amount of the bonds, and if said bonds can then be sold at their face value and *accrued interest*, they may be sold without advertisement."

And if no bids are received after notice has been properly given, the statute further provides that "said board shall in no event sell any of the said bonds for less than the par or face value thereof and *accrued interest.*"

The trial court was clearly right in its construction of the Idaho statutes, and it is in entire accord with not only the decisions of the Supreme Court of the State on the subject but with the uniform practice under the law and the construction that has been placed upon it by the Bench and the Bar of the State since the statute was first enacted. The term "issue" as used in the Idaho statutes has clearly reference to the block of bonds which the district resolves to sell at one time, and is used as a substantive and not as a verb, as is the case in the California statutes; and there is nothing on the face of the bonds and coupons in this case to put a purchaser on notice of irregularities in the issuance of securities, as was the case in *Wright vs. East Riverside Irrigation District, supra.*

In the case of *Page vs. Oneida Irrigation District*, 26 Ida. 108, 141 Pac. 238, the bonds were likewise designated as "First issue—first series." They were dated January 1st, 1903, and bore interest from date. They were actually sold and delivered to the purchasers from time to time during 1904 and 1905, the last sale being nearly three years after the date of the bonds. They matured with reference to their date as provided by the Idaho statutes, and as do the bonds now before the Court. They were all held

valid by the Supreme Court of the State. See, also, O'Neill vs. Yellowstone Irr. Dist., (Mont.) 121 Pac. 283.

Yesler vs. City of Seattle (Wash.) 25 Pac. 1014.

Execution of Bonds by Officers of District

The bonds bear date January 1st, 1911. At that time Harry S. Worthman was Secretary of the District and W. E. Bell was President. They continued as such throughout the year 1911 (Record p. 118), and they signed the bonds in the month of December, 1911, (Record, p. 120). The attempt of appellants to show, *although not an issue under the pleadings* (Rec. p. 51), that any of the outstanding bonds were signed after Bell went out of office failed completely. The most that can be said for their proof on that point is that Mr. Bell commenced to sign the bonds about the middle of December and he continued to sign until about the 2nd of January. He may have signed a few after that date, but there is no attempt to identify the bonds that he may have signed after that date; and as there are over \$200,000.00 of bonds still in the hands of the District there can be no presumption that he signed any of the outstanding bonds after his term expired.

Mr. Bell's successor as Director—W. H. Shane—sat in the meetings of the Board commencing on December 22, 1911, but his bond as a Director was not sent to the Probate Judge for approval until after the meeting of January 2nd, 1912, and there is no evidence when it was approved.

Section 2378 of the Idaho Revised Codes provides that:

“An election shall be held in each district on the second Tuesday in December of each year thereafter (following the organization of the district), at which one director shall be elected for a term of three years, *or until his successor is elected and qualified*. Such director must be a qualified elector and a resident of the division of the director whom he is to succeed in office. Within ten days after receiving the certificates of election hereinafter provided for, said officer shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the probate court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof and filed with the secretary of the board. All official bonds provided for in this title shall be in the form prescribed by law for the official bond of county officers.”

There is no evidence in the record as to when, if at all, Mr. Shane received his certificate of election or took the oath of office, or when his bond was approved by the probate judge.

Mr. Craig, a witness for appellants, testified (Record p. 197) :

"I had these bonds in my possession in the bank both before and after they were signed by the officers. They were signed by Mr. Bell as President, between the 15th of December and sometime after the first of January, 1912. Two or three days afterwards I think. I don't know how many were signed after the first of January. All were signed in our bank room. They had been signed by the Secretary before the President signed them."

Mr. Shane testified for appellants as follows (Record, p. 198) :

"Mr. Bell finished signing the bonds as President on the 3rd or 4th of January."

There is not only no evidence as to when Mr. Shane actually qualified as Director, but there is also no evidence when any one was elected President of the Board of Directors to succeed Mr. Bell. The record shows that a special meeting of the Board was held on December 22, 1911, when Mr. Bell was not present, and it was "Moved and seconded that R. B. Wilson act as temporary President" (Record, p. 195). At this time Mr. Bell was actually engaged in signing the bonds as President of the District, and it was clearly the purpose of the Board to have the signing of the bonds completed before there was any reorganization or election of new officers.

In addition to appellants' failure to sustain the burden of proving that any of the outstanding bonds were signed by persons who were not officers of the District, the record shows a complete ratification by

the new officers of the execution of these bonds. They sent the entire issue when executed to the Fort Dearborn Trust & Savings Bank; \$800,000.00 of them were received by the bank immediately prior to January 5, 1912, and the balance the latter part of February (Record, p. 127). The District carried out, so far as within their power, the contract of September 12, 1911, and obtained waivers from the land owners of all objections to the validity of the bonds and to the carrying out of the contract (Record, p. 207). They made additional contracts with Corkill & Company for the sale of these bonds after the expiration of the first contract (Record, pp. 131, 139-148). They called a special election of the voters of the District for voting a special tax to pay the July 1st, 1912, interest on these bonds, and the election carried by a vote of 107 in favor of such special assessment to 42 against (Record, pp. 207-208). They apportioned the benefits that would result to the lands from the purchase of the irrigation system and the issuance of the bonds, and it was found and determined by the Board in the spring of 1913, when the apportionment was made, that the aggregate of the benefits to the land owners was \$1,100,000.00, and this apportionment of benefits was confirmed by the Court and long since became final and binding on the land owners and the District (Record, pp. 180-181.) They levied the interest tax in the fall of 1913. The ratification of the bonds is complete and we have further the solemn recital in the bonds themselves that every act has been done and performed as re-

quired; surely the record sustains the decision of the trial court on this point. Besides appellants claimed in their answer (Rec., p. 51) that the bonds only lacked the signature of the officers in office at the time they were *delivered*, and there was no issue about the bonds not having been signed by the officers in office when the bonds were signed.

O'Neill vs. Yellowstone Irr. Dist., (Mont.)
121 Pac. 283.

Weyauwega vs. Ayling, 99 U. S. 112, 25 L.
Ed. 470.

Maturity of Bonds.

Appellants attempt to take advantage of a slight ambiguity in the bonds with reference to the maturities. The bonds expressly state that \$110,000.00 in amount mature on January 1st, 1927, which is ten per cent. of the issue and the amount the statute requires should mature at that time. They likewise expressly state that \$176,000.00 in amount mature on January 1, 1931, which is the amount that should mature on that date. But following these expressions is a description of the bonds which it is said does not correspond with the amount which the bonds state will mature on those dates, but there is no evidence that the description of the bonds is correct and that the figures \$110,000 and \$176,000 are wrong. The only evidence on the point is given by the witness Craig for the appellants, who testifies (Rec. p. 196):

"I have not examined the bonds themselves to determine whether \$110,000.00 are made to

mature in the sixteenth year or only \$100,000.00, nor whether \$186,000.00 of them mature in the twentieth year or only \$176,000.00. So I do not know how many bonds actually mature in the sixteenth year or in the twentieth year.”

The District contends that only \$100,000.00 mature the sixteenth year, when it should be \$110,000.00, and that \$186,000.00 mature the last year when it should be \$176,000.00. But, as stated above, there is no evidence except the ambiguity mentioned supporting the contention of the District, besides the total indebtedness is not changed in the slightest; there is at most but a change of \$10,000.00 from the sixteenth to the twentieth year. But as the District has over \$200,000.00 of bonds on hand *unissued*, the discrepancy in the maturities can be readily adjusted in the issuance of the remaining bonds. The trial court was clearly right in adopting the construction that would make the bonds valid instead of the one that would render them void.

Record to be Kept by Secretary and Treasurer.

The provision in Section 2397 of the Revised Codes that “The secretary and treasurer shall each keep such a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser” is obviously directory. It is a record that can only be made up after the bonds have been sold and delivered. There is not the slightest authority for appellants’ contention that the neglect of the officers to perform their duties will render the bonds

void and permit the District to retain the consideration which it received.

The officers of the District certify in the bonds themselves that all the requirements of the statutes have been complied with, and the District will not after it has received the consideration be permitted to say that the certificate in the bonds is false. The district officers, however, had all the information from which to make the record. The contract with Corkill & Company was a sale of the bonds to them to the extent of the amount of bonds taken from escrow. The law never contemplated that where the bonds were sold to a bond house or to a dealer in municipal bonds the secretary and treasurer should follow up the transaction and ascertain the names of the persons to whom the bond house might in turn sell the bonds.

Interrogatories Under Equity Rule 58.

The record is not complete as to what took place in the trial court with reference to the interrogatories submitted by appellants under Equity Rule 58, and to which answers had not been received from plaintiffs Thompson and Williams at the time of the trial. But there is a stipulation in the record (pp. 230-232) which provides, among other things, that:

“If either party shall hereafter desire any additional portion of the record certified to said court or printed as part of the record the same may be certified up to said Circuit Court of Appeals, and, if required, printed as a supple-

ment to the record, at the expense in the first instance of the appellants."

In view of this stipulation we feel at liberty to quote from the transcript of the record in the trial court and shall not insist on the matter being certified to this court and printed as part of the record, unless appellants question the correctness of the matter quoted.

Upon the conclusion of the taking of testimony, Mr. Driscoll for defendants, said:

"We rest, Your Honor, but prior thereto we wish to move to strike all the testimony in the record with reference to the Thompson and Williams' bonds, it having been understood at the time some slight testimony was admitted on that subject that the deposition and his answers to interrogatories would be here, and they haven't come, and we would ask that what testimony there is with reference to them be stricken."

Mr. Haga: "May I suggest, Your Honor, that it be understood that as to Thompson and Williams that the case may be disposed of as if they were simply quasi parties, and not expressly named in the Bill, because that is the only position that I see that they really could occupy in the case."

Whereupon Judge Wood, of counsel for appellants, made a statement and opposed the request for dis-

missal. Thereupon Mr. Haga, addressing himself to Judge Wood, of counsel for defendants, said:

“I am perfectly willing that you may have whatever order you desire, Judge.”

The Court: “Do you desire a dismissal?”

Mr. Wood: “No, we are very doubtful at this time whether we want a dismissal * *.”

The Court: “I don’t know what relief I can give you. If you don’t want a dismissal against Thompson—”

In view of the record before the trial court, we do not see how appellants can complain because the court considered Thompson and Williams in the same position as other bondholders who were not parties on the record. It will be noted that the trial court made no distinction between actual parties to the suit and *quasi* parties. Under the facts proven during the trial and the relief granted it became unnecessary to determine who held the bonds or how they acquired them. Had the court found that the validity of the bonds in any way depended on who were the holders thereof, the *quasi* parties to the suit, including Thompson and Williams, would have been required to make proof of their holdings before a Master, as was done in *Galveston R. F. Co. vs. Cowdrey*, 11 Wall. 459, and as is sometimes done in class suits where there is necessity for obtaining additional proof relative to the bonds held by *quasi* parties.

It is impossible to see, however, how appellants

were injured by the failure of Thompson and Williams to answer the interrogatories submitted. Their answers could not have altered the decree. If they had answered every interrogatory in the way most prejudicial to their interests it would not have affected the result in the slightest. If they had said that they acquired all their bonds by exchanging Canyon Canal Company bonds in accordance with the notice which was sent them by Corkill & Company, or that they bought their bonds from Corkill & Company, which is the only other way to which exception could be taken by appellants, it would not have altered the views of the trial court, for the other plaintiffs acquired their bonds in one or the other of the ways mentioned.

In this connection we beg to refer to the discussion in the record between counsel and the court as to appellees furnishing appellants with whatever information the bondholders committee had regarding the deposited bonds. Mr. Seymour, chairman of the committee, explained that while he had a list of the bonds that had been deposited, giving the number and denomination, he did not have the names of the persons who had deposited the bonds with the Trustee (New York Trust Company); but counsel for plaintiffs offered (Rec. pp. 187-191) to assist defendants' counsel in obtaining from the Trustee a list of the persons who had deposited their bonds and the amount of bonds deposited by each. Counsel for defendants, however, seemed to lose all interest in the matter when plaintiffs offered to as-

sist in securing the information. This apparently greatly impressed the trial court, for at the close of the day's session the court again referred to this matter, and said:

"Before adjourning, though, Judge Wood, I suggest that if you want the names of the holders of these bonds you had better say so to counsel, and see what steps will be taken to get them for you."

Mr. Wood: "I will consider that matter and present the matter tomorrow morning."

And thereafter counsel for defendants did not again refer to the subject. They were apparently entirely willing to drop the matter when they found that it would not be resisted by plaintiffs and that it would not serve to delay the trial of the case.

In view of this record no consideration should be given to the repeated statements of counsel for appellants that information to which they are entitled has been withheld from them and that they have in some way been prevented by these plaintiffs or the bondholders from obtaining information needed for their defense. They had ample time to take the deposition of the Trust Company or its officers if they desired the names of those who had deposited bonds. They could have obtained the information at the time of the trial if they had signified that they wanted it, but when plaintiffs offered to assist them in obtaining it they decided they did not want it.

There is also grave doubt as to whether the in-

interrogatories submitted come within the purview of Equity Rule 58. The discovery which appellants sought was of an inquisitorial character and related to the evidence of the plaintiffs in support of the Bill, rather than to the defenses pleaded by defendants. An examination of the Answer will show that the defense relied upon (Recond. p. 45) went to the procurement of the contract of September 12, 1911, between the District and Corkill & Company and to the fraud which it was alleged (although wholly abandoned on the trial) that Corkill & Company had committed in obtaining the contract, and none of the interrogatories pertained in the slightest degree to these extravagant charges of fraud and collusion. See annotations to Rule 58 in Hopkins, Fed. Eq. Rules, *Second Edition*. Also:

J. H. Day Co. v. Mountain City Mill Co., 225 Fed. 622.

Wolcott v. Nat. Electric Signalling Co., 235 Fed. 224.

Bonney Supply Co. v. Heltzel, 243 Fed. 399.

Gen. Electric Co. v. Independent Lamp & Wire Co., 244 Fed. 825.

Consideration Received by District for Bonds.

The contract of September 12, 1911, sets forth the history of the project, the condition it was in at the date of the contract and the full consideration to be received by the District for the bonds. Appellants' entire defense was apparently based on the theory that they would be permitted to show that the Dis-

trict had made a bad bargain and had purchased an irrigation system, which, for one reason or another, was not worth as much as the former officers believed it was. An attempt was made to show that the canals did not have the capacity and were not as substantially built as they should have been, that the incumbrances were of doubtful validity, and matters of that kind. Clearly such matters could not be tried out in this case. Neither could the court now examine into the physical condition of the project and make a reappraisement at this time of its value in 1911, and substitute the views of the court for the discretion vested in the Board of Directors.

No attempt was made to show fraud or collusion between the then officers of the District and Corkill & Company, and it was apparent to all that the officers of the District were far better advised as to the value of the property purchased than Corkill & Company could possibly be, for the District was already in possession of the system under a quit claim deed made the previous month, and the District had been organized for more than a year for the sole purpose of acquiring this system. It had had estimates made by its own engineers, as required by the District law, of the condition and value of the system and the amount it would require to purchase it and make certain necessary repairs and improvements, and these estimates had been approved by the State Engineer, and the whole matter had been approved by the people of the District who had voted the bonds for the sole purpose of carrying out the plans that had been

adopted; and the legality of all the proceedings had in turn been approved by the District Court and the Supreme Court of the State in the confirmation proceedings (*Emmett Irrigation District vs. Shane*, 19 Ida. 332, 113 Pac. 444).

There being no question of fraud or collusion in the execution of the contract, the trial court was clearly right in saying: "If the directors acted within the scope of their authority we cannot relieve the District from the consequences of a bargain which may have turned out to be bad." (Record, p. 103). And in this connection we desire to say that there is not the slightest evidence that the bargain was not a good one from the standpoint of the District. It is only when the District is called upon to pay for what it wanted and received and is now using and enjoying, that it suggests for the first time that it might have been possible for it to have driven a harder bargain.

The contract itself provides that (Rec. p. 74) :

"The District is to procure from each and every person owning land within said District a waiver of errors; such waiver of errors shall be prepared by the said Adams & Candee and shall include a waiver of all errors in the proceedings relative to the organization of the said district and the issuance of the said bonds and shall consent to the levy of a tax to pay the principal and interest upon said bonds in the manner provided and intended to be provided by the laws of the State of Idaho, regardless of

the constitutionality of the Act under which said proceedings were had and such levy made or any provisions of such Act."

The substance of the waivers is set out (Record, pp. 205-207) and Mr. Shane testifies that they furnished waivers from approximately ninety per cent. of the land owners. The subsequent contracts for the sale of the bonds (Record, pp. 131-150), the calling of the special election to vote interest on the bonds in June, 1912, which was carried by 107 votes in favor and only 49 against the levy, (Record, pp. 207-208), the levying of the tax in 1913, the financial statement of the District prepared on the first of February, 1913, (Record, pp. 203-204) and certified by the Secretary and President of the District as correct and in accordance with the books of the District, stating the canals and water rights which the District acquired from the Canyon Canal Company under the contract of September 12, 1911, had a value of approximately \$2,000,000.00 and scheduling the bonds now in question as "Outstanding Legal Obligations of the District", all show that the District was not dissatisfied with its bargain or questioning the value of what it received for the bonds. In fact the possibility of securing a better bargain seems to have occurred to the District only when the financial market changed so as to make it impossible for Corkill & Company to take the balance of the bonds. Then far-sighted leaders in the District probably concluded that Corkill & Company and

the holders of its then outstanding bonds could be induced to take the remaining bonds in order to avoid an attack on the bonds that they already held.

But, while it is immaterial what actuated the District in attacking the validity of the outstanding bonds when it was unable to sell the balance, the fact remains that the ratification of the contract of September 12, 1911, and the vindication of the judgment of the officers of the District in entering into that contract are most complete.

Under the contract referred to the District was to receive the fee simple title to the irrigation system, canals and water rights for \$820,000.00. The provision in the contract for delivering its bonds in certain installments as Corkill & Company carried out its contract and delivered the property purchased does not change the character of the transaction. It was essentially a contract of purchase and sale of the right, title and equities of the Canyon Canal Company and of the bondholders and lien claimants in and to the irrigation system and water rights for \$820,000.00 in bonds and an agreement on the part of Corkill & Company to sell the remaining bonds (\$280,000.00) at par and accrued interest; and as security for the performance of the latter obligation, some of the bonds given in payment for the purchase of the system were to be held in escrow by the Fort Dearborn Trust & Savings Bank and delivered to Corkill & Company pro rata as they carried out their contract to purchase the remaining bonds.

It is true that on August 15, 1911, the Canyon Canal Company had given a quit claim deed of an interest in this system to the Emmett Bench Canal Company, the Operating Company created under the Carey Act construction contract between the Canyon Canal Company and the State of Idaho (Record, p. 176), and that the Emmett Bench Canal Company had in turn on the same day given a quit claim deed of the interest which it had received to the Emmett Irrigation District; but apparently all parties assumed that this quit claim deed conveyed nothing but the temporary right of management and operation (Record, pp. 199-200).

The deed from the Canyon Canal Company for good reasons was not deemed sufficient by the Irrigation District. It wanted a deed to the system free and clear of encumbrances and not simply a temporary right of operation under which improvements which it might make on the system would simply enhance the value of the security of the lien holders and bond holders of the Canyon Canal Company and might be swept away at any time by a foreclosure of the mortgages and trust deeds upon the system. The deed itself, of August 15, 1911, contained important reservations in the Canyon Canal Company. In addition to the right reserved to collect over \$600,000.00 under the water contracts which it had issued and which were liens on the lands in the district and on the water rights and interest in the canal system purchased under such contracts, the deed contained a further reservation not mentioned in the

abstract of the deed in the record but embraced in a certificate from the Clerk of the trial court, filed with the Clerk of this Court pursuant to the stipulation hereinbefore mentioned, reading as follows: "Reserving, however, to the party of the first part for a period of five years from the date hereof the right to enlarge the canal first above described for the purpose of carrying water for power purposes or the developing of power."

There was also the claim of Trowbridge & Niver Company for several hundred thousand dollars (Record, pp. 176-177) for money advanced for the completion of the system under the Carey Act contract with the State of Idaho in excess of the amount up to that time realized from the sale of water rights, and while the claim was referred to in the contract as "unsecured", to distinguish it from the claims secured by mortgages on the system, it was, nevertheless, an obligation that was being pressed and it was contended that it was a lien under the Act of Congress of June 11, 1896, amending the Carey Act, which provides that:

"A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, *for the actual cost and necessary expenses of reclamation* and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

Corkill & Company under the contract of September 12, 1911, agreed to deliver to the District the said irrigation system free and clear of the reservations contained in the previous quit claim deed of the Canyon Canal Company and free from any *defect* there might be in such a deed; free and clear of the claims of Trowbridge & Niver Company, free and clear of the claim of the bondholders and lien claimants of the Canyon Canal Company, aggregating about \$600,000.00, and to release the outstanding water contracts which appellants now contend took substantially the entire capacity of the system and on which there was due and collectible at the time of the contract over \$600,000.00. For turning over these rights and interests in the system and water rights the District agreed to pay \$820,000.00 in bonds at par.

Corkill & Company, apparently realizing the difficulty of selling such a large block of bonds for cash and taking the cash to pay the obligations of the Canyon Canal Company, conceived a plan which was entirely proper and usually resorted to in business transactions of large magnitude. They provided that the bonds of the District to be delivered in payment for the system, as well as those that were to be sold for cash, were to be deposited with the Fort Dearborn Trust & Savings Bank; and with the same depository they agreed to deposit the title papers, releases and deeds conveying to the District the free and unincumbered title to the system. They then persuaded the Canyon Canal Company to accept

bonds of the District in payment for its interest in the system, and the Canal Company in turn, with Corkill's assistance, persuaded the holders of the Canyon Canal Company's bonds and securities to accept payment from the *Canyon Canal Company* in Irrigation District bonds.

Appellants are clearly wrong in assuming and arguing that the Irrigation District ever exchanged any of its bonds for bonds of the Canyon Canal Company. The contract under which the bondholders of the Canyon Canal Company deposited their bonds and agreed to accept Irrigation District bonds in satisfaction of their claims shows clearly that they were dealing with the *Canyon Canal Company*.

This contract (Record, pp. 150-153) states, that:

"Whereas, arrangements have been made for the purchase by the said Emmett Irrigation District of all of the properties of the said Canyon Canal Company and the delivery of certain of the bonds above mentioned in payment therefor to an amount sufficient to enable the said *Canyon Canal Company* to exchange bonds of the said irrigation district for all of the outstanding bonds and notes of the said Canyon Canal Company."

Clearly those who exchanged Canyon Canal Company bonds for Irrigation District bonds were dealing with the *Canyon Canal Company* and not with the District. The latter did not receive any of the bonds of the Canyon Canal Company. They were turned over by the Canyon Canal Company to the

Trustee under its mortgages, and the Trustee in turn released the mortgages and cancelled the bonds, and the *release* was delivered to the Emmett Irrigation District in connection with the deed to the system.

The learned trial court could see no objection to the procedure that was followed in passing the free and unincumbered title from the Canyon Canal Company to the District, and we submit there is none. The proceeding was clearly within the express terms of the statute. The District was only buying canals, water rights and irrigation works. That is what it planned to get at the beginning, and that is what it had when the transaction was closed, and its bonds went direct from the District to the Canyon Canal Company and Corkill & Company. It knew no other parties in the transaction. It had no dealings with the creditors of the Canyon Canal Company. The procedure followed by the Canyon Canal Company and Corkill & Company to obtain the release of the Canyon Canal Company's obligations did not concern the District. In some cases cash may have been used by Corkill & Company or the Canyon Canal Company, but undoubtedly in most cases they were successful in effecting exchanges; but so far as the Canyon Canal Company creditors were concerned, they were dealing directly with the debtor Company and not with the District.

There is no occasion here for going beyond the express provision of the statutes, as was done in the cases cited below where the transactions were held entirely legal:

Wash.-Ore. Corporation v. City of Chehalis,
(Wash.) 136 Pac. 681, 683.

O'Neill v. Yellowstone Irr. Dist., 44 Mont.
492, 121 Pac. 283.

Kinkade v. Witherop, 29 Wash. 10, 69 Pac.
299.

*District Estopped by Its Conduct and the Recitals
in the Bonds.*

The bonds, after stating that they are issued by authority of the Irrigation District Act, contain the following certificate or recital:

“And it is hereby certified that all things required by law to be done in and about the organization of said district and the issuance of the said bonds have been done, have happened and have been performed, and that the issuance of this bond has been duly and legally authorized by vote of the electors of said district at a special election duly called and held in accordance with the provisions of the said Act and by resolution of its Board of Directors, and that all other acts, conditions and things required by the laws and constitution of the State of Idaho precedent to and in the issue and delivery of this bond have been done, have happened and have been performed, and that said bonds are the valid, binding and legal obligation of the said district, that all the real property included within said district is subject to the levy of an annual tax for the payment thereof.”

The foregoing certificate is made over the signature of the President and Secretary and the seal of the District, and we respectfully submit that the District cannot, while retaining the benefits of the transaction and using and enjoying the property received, be permitted to set up the falsity of the certificate and show that neither it nor its officers have done what they certified they had done. No fraud or collusion having been shown, the District officers now in office will not be permitted to totally disregard the certificate of their predecessors.

See the recent decision of the Circuit Court of Appeals of the 8th Circuit, in *Shelton v. Gas Securities Co.*, 239 Fed. 653, a case involving irrigation district bonds under the Colorado statute.

Abbott in his work on Public Securities, Section 276, in discussing the doctrine of recitals, as to facts, says:

“Their recitals or statement in the bonds issued by the public corporation that they have been so complied with or that certain facts or conditions exist, is conclusive of the matter so stated and recited and binding on the corporation for, as said by the Supreme Court of the United States: ‘The recital is itself a decision of the fact by the appointed tribunal.’ * * *

In *Burroughs on Public Securities*, page 305, the author states what he deduces as the three leading points of the municipal decision:

‘I. The powers of the officers to decide that the conditions of issue have been fulfilled, is an

implied one, deduced from the supposed necessity of the case that some one must decide before issue.

‘II. The evidence of the decision of the officers is to be found in the recital in the bond. This is the record of the decision, and a general recital that the law under which the bonds have been issued, has been complied with, is a decision that the precedent conditions have been fulfilled.

‘III. Such a decision is conclusive upon the municipality as to a bona fide holder of its bonds, who is not bound to look for further evidence of compliance with the conditions of issue. The recitals or statements work no estoppel, however, except where made by those officials or that tribunal especially designated by law or having the general power to perform such acts. If made by those having no authority to decide and assert the facts which constitute the conditions precedent to the legal issue of bonds, the recitals will not be accepted as a substitute for proof.’ ”

Some of the leading cases on the subject of the binding effect of recitals are cited in the “Brief of the Argument”, and we shall not extend the discussion here, except to call attention to the recent case before the Circuit Court of Appeals for the Sixth Circuit, entitled *Town of Newbern vs. National Bank of Barnesville*, 234 Fed. 209, where the bonds were held valid, although the officers of the town had failed to

comply with substantially every requirement of the law. Whereas in the case at bar, there has in fact been a more strict compliance than is usually found in the issuance of municipal securities, and we have the added weight, which the record shows greatly influenced purchasers, that the bonds had been held valid by the Supreme Court of the State. It should be noted also that in the State of Idaho the Irrigation District Law has uniformly received a very liberal construction in favor of the validity of the securities. While the Supreme Court of the State has in numerous decisions confirmed the validity of the securities, it has never held a single bond issue invalid.

We want to call the Court's attention particularly to the case of *Page vs. Oneida Irrigation District*, 26 Ida. 108, 141 Pac. 238. We believe this case disposes of practically every question involved in the case at bar, and, as stated by the learned judge of the Trial Court, it was unnecessary to go as far in this case as did the Supreme Court of Idaho in that case.

Page was a land owner in the Oneida District. He brought suit to remove a cloud from the title to his property arising from the acts of the District in making four bond issues, dated, respectively, January 1, 1903, 1906, 1907 and 1910, and from making several tax levies for the purpose of doing construction work, for which bonds had been issued, and for paying interest on the several bond issues. It was alleged and proven that the bonds of the issue dated January 1, 1903, were used in payment for labor and

services performed for the District and materials furnished in the construction of the works, and that some of them were sold by a broker who was allowed a commission of ten per cent. for making the sale. Substantially the same facts were shown with reference to the other issues. In the case of at least one issue the President in office at the time the bonds were dated went out of office before signing the bonds, and after a lapse of several months or a year after he ceased to be an officer of the District he signed the bonds, with the consent, knowledge and approval of the then officers. The bonds in each case bore interest from date, and matured with reference to their date and without regard to the date of their delivery by the District. They were usually delivered long after the date of the bonds. In the case of the bonds dated January 1, 1903, they were sold in installments from time to time throughout the year 1904 and as late as September 21, 1905.

Attached to the Bill as exhibits were lists showing the date and the number of the bonds that were issued to those who had taken them in exchange for labor and supplies, many of whom had in turn disposed of them to others. Plaintiff offered to do equity and alleged that it was impossible for him to determine what obligations of the District were valid and what were invalid, or the amount of the liens that had been created or attempted to be created against his land because of the condition of its records and the manner in which its bonds had been issued, exchanged and sold; but he offered to pay whatever taxes should

be found to be valid and subsisting liens or necessary to pay interest on the legally issued and outstanding bonds. None of the bondholders were parties to the suit and no proof was made as to how many of the bonds were in the hands of innocent holders for value, or who actually held the bonds at the time of the suit. The form of bond was in evidence, from which it appeared that all bonds were negotiable instruments embodying recitals substantially the same as do the bonds now before the Court in this case. Plaintiff had paid no taxes since the year 1908 and had done nothing to in any way recognize the validity of the last issue of bonds; but it appeared he had accepted a small amount of the first issue in exchange for labor performed for the District.

The court found the facts substantially as alleged in the complaint, and also found that the board had always acted in good faith and that there had been no fraud or collusion; that plaintiff had received and would receive as a land owner in the district the benefits of the property acquired by the district from the proceeds of the bonds, or in exchange therefor; that the bonds were negotiable and had in many cases been sold by the original purchasers. It held that plaintiff was estopped from questioning the validity of the bonds, and in effect found and decreed that the bonds were legal and valid obligations of the District, and that it was the duty of the district to levy the taxes from year to year to pay the interest thereon.

The case illustrates the attitude of the Supreme

Court of the State of Idaho towards irrigation districts and irrigation district bonds, and the extent to which it will go to prevent repudiation of obligations by irrigation districts or the taxpayers thereof and protect the integrity of negotiable instruments issued by public corporations.

In this connection we want to refer briefly to the law of negotiable instruments in the State of Idaho.

Law of Negotiable Instruments in Idaho.

Idaho has adopted the uniform Negotiable Instruments Law, and we deem it unnecessary to quote the statutes at length on that subject, as that Act is readily accessible.

Section 59 of the Act (Section 3516, Idaho Revised Codes) provides that:

“Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was *defective*, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course * * *

Every holder of the Emmett Irrigation District bonds is entitled to the benefit of the presumption created by the above statute. He is presumed to be a holder in due course, and that presumption cannot be overcome except by evidence showing that the title of a former owner was *defective*. When that has been shown, the holder of the instrument must

prove that he, or some one under whom he claims, acquired the instrument "in due course."

Section 55 of the Act (Section 3512, Idaho Rev. Codes) defines what constitutes "defective title" within the meaning of the preceding section. This section reads as follows:

"The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud."

Have the defendants shown that any person who has negotiated the Emmett bonds comes within the terms of the above statute? Has it been shown that any one obtained the bonds, or any signature thereto, by fraud? By duress? By force? By fear? Or by other unlawful means? Or for an illegal consideration? Or that any one has negotiated the bonds in breach of faith? Or under such circumstances as amount to fraud? The most that can be said for appellants' case is that they attempted to prove *inadequate or partial consideration*; but the Trial Court very properly held that it could not substitute its judgment for the discretion vested in the Board, and in the absence of fraud or collusion the District could not show that it had made an unwise bargain.

The Supreme Court of Idaho, in *Winter vs. Nobs*, 19 Ida. 18, 112 Pac. 525, in considering the Idaho statutes quoted above and the presumptions in favor of the holder of negotiable instruments, said:

“It is contended by appellant that mere suspicious circumstances are not sufficient to put a purchaser of a note on inquiry, and that it is necessary, in order to defeat his right of recovery, to either show actual notice of the fraud or notice of such facts and circumstances as would charge him with actual bad faith in taking the paper without investigating the circumstances under which it was issued. In support of this position, counsel rely on Section 3513, Revised Codes (Section 56, N. I. L.), which reads as follows: ‘To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.’ We readily agree with this contention. We think it is only actual knowledge of the defect or infirmity, or notice of such facts and circumstances as would put a man on inquiry and would charge him with bad faith or the imputation of dishonest dealing, that was intended by the statute to defeat a recovery. This view is abundantly supported by the authorities.”

The Court then quotes from a number of cases, including the following from *Gray vs. Boyle*, 55 Wash. 578:

“ ‘The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder’s right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fides*, his title, according to settled doctrines, will prevail.’ ”

And the court then adds:

“We are in full accord with this construction of the law.”

The same rule was applied in *Vaughn vs. Johnson*, 20 Ida. 669, 119 Pac. 879, and in *Town of Newburn vs. National Bank of Barnesville*, heretofore cited, under the same Act (Negotiable Instruments Law).

See also *Shelton v. Gas Securities Co.*, 239 Fed. 653, 152 C. C. A. 487.

Counsel for appellants admit that they do not know of a single bond in the hands of a person who is not a holder for value in due course. They admit that if all the bondholders should appear in court with their bonds the appellants could not say which bonds had been delivered at par and accrued interest for cash or for payment for the irrigation system, or for any of the other considerations which they say were contemplated by the agreement of September 12, 1911. They admit they have no evidence with which they can attack any particular bond, and they have no further evidence than what is now before the Court relative to the transactions complained of.

What valid reason can be urged therefore for denying relief to the bondholders who are now before the Court, or the other bondholders whom they represent as members of the class? Over five years have elapsed since the transactions complained of took place. How much more time should appellants have in which to obtain evidence to show their own misconduct and the irregularities of their own officers? Manifestly the time consumed in this litigation is not worrying appellants, who have the full use and enjoyment of the irrigation system, while the bondholders have had no interest for five years.

The Trial Court entered the only form of decree that should be entered. Plaintiffs introduced one bond for the purpose of showing the terms of the contract. They also produced at the trial all the bonds held by plaintiff Gaebler, aggregating \$47,-

500.00, and offered to produce the bonds of all the plaintiffs in the suit for purposes of examination; but as the bonds were not due and as they simply sought to remove a cloud from the title, it seemed unnecessary to formally introduce them in evidence and leave them as part of the records of the Court. Plaintiffs also introduced all the coupons belonging to the bonds in suit, not simply the coupons belonging to the Gaebler bonds, as stated on page 16 of appellants' brief.

It being clear that appellants had produced all the evidence they had against all the bonds, and it being necessary for the Court to determine what bonds were valid and what were invalid, and to determine the proportionate part that plaintiffs were entitled to receive out of the trust fund in the hands of the treasurer, it entered the only decree that could be entered under the evidence and the laws of the State of Idaho as construed by its highest Court.

Respectfully submitted,

RICHARDS & HAGA,

McKEEN F. MORROW,

Solicitors for Appellees,

Residence: Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District,
Appellants,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, H. S. GUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated.
Appellees.

Appellants' Petition for Rehearing

Upon appeal from the District Court of the United States, District of Idaho, Southern Division

J. M. THOMPSON,
Residing at Caldwell, Idaho, and
FREMONT WOOD and
DEAN DRISCOLL,
Residing at Boise, Idaho,
Solicitors for Appellants and Petitioners.

No. 3062

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Circuit Court of Appeals
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Appellees.

PETITION FOR REHEARING

Come now the appellants above named, by their counsel of record herein, and petition this Honorable Court for a rehearing herein on the following grounds:

I.

It does not appear from the decision of the court herein, that the court has passed upon the excessive issue of bonds maturing in twenty years from date,

to wit, January 1st, 1931; or the deficiency in amount of bonds which should have matured on the 1st day of January, 1927, the same being covered by and included in subdivision (c), paragraph 18 of appellants' assignment of error, transcript, pp. 223 and 224.

II.

Because it fails to appear from the decision and record herein, that the court has passed upon the appellants' objections to the decree in this cause, quieting the title to the bonds owned and held at the time of the commencement of this action by J. Paul Thompson, the original plaintiff in this action, after he had failed and refused to answer the interrogatories, in accordance with the decision of the trial court. Appellants' Assignments of Error 1a and 1b, Trans., p. 217.

We are led to the conclusion first stated, by reason of the fact that the court has apparently followed the conclusions as well as the facts stated by the trial court, wherein the trial court states, "The defenses are therefore limited to the claims that the bonds are irregular in their form and in the manner of their execution, and that many of them, as appears from the contract and explanatory testimony, were disposed of for an irregular consideration." As to these conclusions this court says:

"We agree with the court below, that the objection made to the form of the bonds and the manner of their issuance are without merit."

If it was the purpose or intent of this court to pass upon the effect of the under issue of the sixteen year maturities, or the over issue of the twenty year maturities, it is apparent that it must have done so with the above general adoption of the conclusions reached by the trial court. But we do not understand and we cannot conclude that it was the intention of this court to hold and decide that an under issue or over issue of bonds to become due upon any specific date is an irregularity that goes only to the form or the manner of the execution of the bond. The trial court, and this court, has held that the objections raised as to the form of the bonds and manner of execution are without merit. But it nowhere appears in the decision of the trial court quoted, or in the decision of this court, that the extension of the twenty year maturity of \$10,000.00 beyond the power of the District to contract is a matter of form and in its application to this case that the objection is without merit. We apprehend that there is no doubt in the mind of the court that the sixteen year issue, due on January 1st, 1927, was actually \$10,000.00 less than the amount required by law for distribution to that particular payment, and that likewise there is no question but that the twenty year issue was actually \$10,000.00 in excess of the amount which the law required should be paid at that maturity. The language of the bond (Trans., p. 14) for the sixteenth year maturity, is as follows:

“One hundred and ten thousand dollars (\$110,000.00) in amount, being bonds numbered

from M-43 to M57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927."

We concede that the statement in numerals of \$110,000.00 is the correct amount which the law required should be paid at this maturity, but this statement of amount is limited by particular description of the bonds by letter and number, limiting the issue to \$100,000.00, the explanatory language being as follows: "being bonds numbered from M-43 to M-57, inclusive, and from D-657 to D-826, inclusive, on January 1st, 1927."

The bond shows upon its face that the bonds embraced in the entire issue consist of three denominations. Bonds of \$100.00 each, \$500.00 each and \$1,000.00 each. The \$1,000.00 bonds are numbered M-1 to M-262, inclusive, being 262 in number; the \$500.00 bonds were numbered from D-1 to D-1646, being 1646 in number. The \$100.00 bonds were numbered consecutively from C-1 to C-150, being 150 in number. It appears then upon the face of the bonds that the sixteen year maturity as actually issued was only \$100,000.00, as shown by the bonds actually enumerated

| | |
|--------------------------------|---------------------|
| M-43 to M-57, 15 bonds..... | \$ 15,000.00 |
| D-657 to D-826, 170 bonds..... | 85,000.00 |
| Making a total of..... | <u>\$100,000.00</u> |

In the same manner the bond shows the twenty year maturity to be \$186,000.00 instead of \$176,000.00, as stated in the bond itself. The bonds enumerated in this issue being M-193 to M-262, inclu-

sive, and D-1451 to D-1646. This enumeration shows that there were seventy of the M. denominations, or \$70,000.00, and 232 of the D. denominations, amounting to \$116,000.00, making a total of \$186,000.00. .

If we are correct in our conclusion that the statement of the amount is controlled and limited by the actual enumeration of the specific bonds issued under these maturities, there can be no question about the \$10,000.00 shortage in the sixteen year maturities and the \$10,000.00 excess in the twenty year maturities. The legal effect of this unlawful exercise of power has added to the actual obligation of the district, as permitted by the statute, twenty-four hundred dollars, this amount being four years' interest at six per cent. on the \$10,000.00, which should have been paid January 1st, 1927, but is actually carried forward and not made payable until January 1st, 1931.

We think it a matter of justice to the court, as well as in the interests of the appellants, that this matter may be called to the attention of the court, in order that the legal effect of this situation may be specifically and understandingly passed upon.

We are not contending that this usurpation of power exercised in the issuance of the two maturities above referred to, extend to the entire bond issue; neither are we satisfied that the district has been injured by the failure to make the sixteen year maturity \$110,000.00 instead of \$100,000.00, but we must respectfully urge upon the court that the \$10.-

000.00 excess of the twenty year maturity, in its application to this action must extend to all the bonds of that maturity. Because, if any of them are void on account of the excessive issue, they are all void, and the court is without power to segregate and point out those which are valid and those which are invalid.

We understand that it was the intention of this court to apply the doctrine of estoppel only upon the assumption that the District acted within the proper exercise of its legal powers. To this part of the decision we are taking no exception, but are urging upon the court that the fixing of these two maturities was unauthorized by the law and therefore an excessive use of power and in direct violation of the limitation of power imposed by the Legislature.

Section 2397 of the Idaho Revised Codes requires that such bonds "shall be negotiable in form and payable in money of the United States as follows, to wit: At the expiration of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent; *Provided*, That such percentages may be changed suf-

ficiently so that every bond shall be in an amount of one hundred dollars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments.”

Under the command of this statute the sixteen year maturity was exactly \$110,000, and the twenty year maturity was exactly \$176,000.00. The district, however, has not observed these limitations, and in that respect there is a bond issue herein one instance in excess and in the other a deficiency, each in the same amount.

In the case of *Brenham vs. German American Bank*, 144 U. S. Rep. 173, the United States Supreme Court held that bonds issued by a city with the provision on the face of each bond that it should be redeemable by the city, “after the expiration of ten years from date,” when the ordinance which authorized the issue, provided that the city should have the right to redeem “at any time after five years from date” rendered the entire issue void, “because the officers of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption,” and, “as there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons.” Citing in support thereof:

March v. Fulton County, 77 U. S., 10 Wall. 676, (19:1040);

East Oakland v. Skinner, 94 U. S. 255, (24: 125);

Buchanan v. Litchfield, 102 U. S. 278, (26: 138);

Hayes v. Holley Springs, 114 U. S. 120, (29: 81);

Daviess County v. Dickinson, 117 U. S. 657, (29:1026);

Hopper v. Covington, 118 U. S. 148, 151, (30: 190, 192);

Merrill v. Monticello, 138 U. S. 673, 681, 682, (34:1069, 1073).

“Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter, (Peoples Bank v. School District, 3 N. D. 406 . . .) or a longer term, (Norton v. Town of Dyersburg, 127 U. S. 160 . . ., Barnum v. Okalona, 148 U. S. 393, . . .) than that authorized are invalid.” Stowell v. Realto Irr. Dist., (Cal.) 100 Pac. 248-251.

In the case of Peoples Bank v. School District, *supra*, the bonds involved were made payable eleven days short of ten years from their date, and these bonds were held absolutely invalid, the court saying: “There is no more power to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the magnitude of the departure from the statutory requirement it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days upon what principle can we draw it at 30 days, or six months or a year.”

Assuming that we are correct in our conclusion that the fixing of the amount of the sixteen and

twenty year maturities is in violation of the limitation of power conferred by the legislature, "the purchaser or holder of municipal bonds is chargeable with notice of the requirements of the law under which they are issued." *Barnett v. City of Denison*, 145 U. S. 135.

Upon this question we call the attention of the court to the authorities quoted on pages 34 to 39, inclusive, of our original brief in this case. These authorities were presented in the original brief in support of the question here presented, but also in connection with other questions decided adversely to appellants, and which are not involved in this application for rehearing.

The second ground of this petition involves that portion of the decree which in effect quiets the title to the original plaintiff in the action, J. Paul Thompson, in and to the specifically enumerated bonds set forth in the original bill of complaint. This objection is based upon the refusal of the plaintiff Thompson to answer the interrogatories for discovery which were submitted for his answer on August 17, 1916, under equity rule 58, (T. pp. 91-95). For this reason the appellants contend that the said plaintiff should not be permitted to share the benefits of this favorable decree, under the doctrine of class representation. Thompson, having refused to answer the interrogatories, the bill as to him should have been dismissed with prejudice under the provisions of equity rule 58.

It is true that we did not make the motion for dismissal as to Thompson upon the trial, because we desired a final ruling by which he would be bound in the final decree. Under the equity rule cited, "Any party failing or refusing to comply with such an order shall be liable to attachment and shall also be liable if a plaintiff to have his bill dismissed."

It will be noted that the actual making of the order for the examination of plaintiff, pursuant to the rule, was waived by plaintiff's counsel by stipulation (T. p. 95). The order having been waived by stipulation of counsel, the requirement for the actual answer of the interrogatories was as binding upon the plaintiff as though the order for the examination had actually been made by the court.

The interrogatories submitted are fully set forth (T. pp. 91-44). The bill of complaint shows that this plaintiff was the owner and holder of more than \$100,000.00 of this bond issue, and the appellants believe that an answer to these interrogatories would disclose the fact that this plaintiff was the representative of Corkill or Corkill & Company, and fully advised of all the transactions of which we complain, and that the bonds enumerated in his bill of complaint were a portion of the bonds which we have throughout the proceedings referred to as the commission bonds. This plaintiff, however, not only refused to answer the interrogatories but failed to appear at the trial, and his counsel consents to a dismissal as to him, assuming, of course, that he will acquire all the rights under the further prosecution of the case in

the name of the new plaintiffs upon application of the doctrine of class representation.

As this is an equity action, we think the conduct of this plaintiff, in its application to this case, has been such that he should not be permitted to profit by the decree herein.

Again, by reference to the bill of complaint herein, it appears that a considerable portion of the bonds owned by this plaintiff are included in and a portion of the sixteen and twenty year maturities, the latter of which we contend is absolutely void, the former maturity probably void. By reference to the recitals in the bond the sixteen year maturity consists of bonds M-43 to M-57, inclusive, and from D-657 to D-826 inclusive. (T. p. 14.)

The plaintiff's original complaint, (T. p. 18) shows that plaintiff holds of the sixteen year maturities bonds D-673, D-674, D-675, D-676, D-717 to D-726 inclusive, D-742, D-743, D-780, D-783, D-784, D-785, D-786, D-787, D-788, D-801 to D-814 inclusive, being 37 bonds, amounting to \$18,500.00. It also shows that plaintiff Thompson holds of the twenty year maturity M-203 and M-232; also D-1432, D-1598, D-1599 and D-1600 to D-1609 inclusive, the same being two bonds for \$1,000.00 and 13 bonds for \$500.00 each, making a total of \$8,500.00.

Even though the court should hold against us upon the point that the plaintiff Thompson is not entitled to a decree, by reason of his failure to answer the interrogatories for discovery, there should still be excepted from the decree in his favor, the bonds issued

in excess of authority and specifically enumerated in his complaint, because such bonds are absolutely void.

For the reasons above given, your petitioners respectfully pray that such rehearing be had.

Respectfully submitted,

J. M. THOMPSON,

Residing at Caldwell, Idaho, and

FREMONT WOOD and

DEAN DRISCOLL,

Residing at Boise, Idaho,

Solicitors for Appellants and Petitioners.

I, J. M. THOMPSON, residing at Caldwell, Idaho, of counsel for the appellants and petitioners in the foregoing petition named, do hereby certify, that in my judgment the said petition is well founded and that it is not interposed for delay.

J. M. THOMPSON.

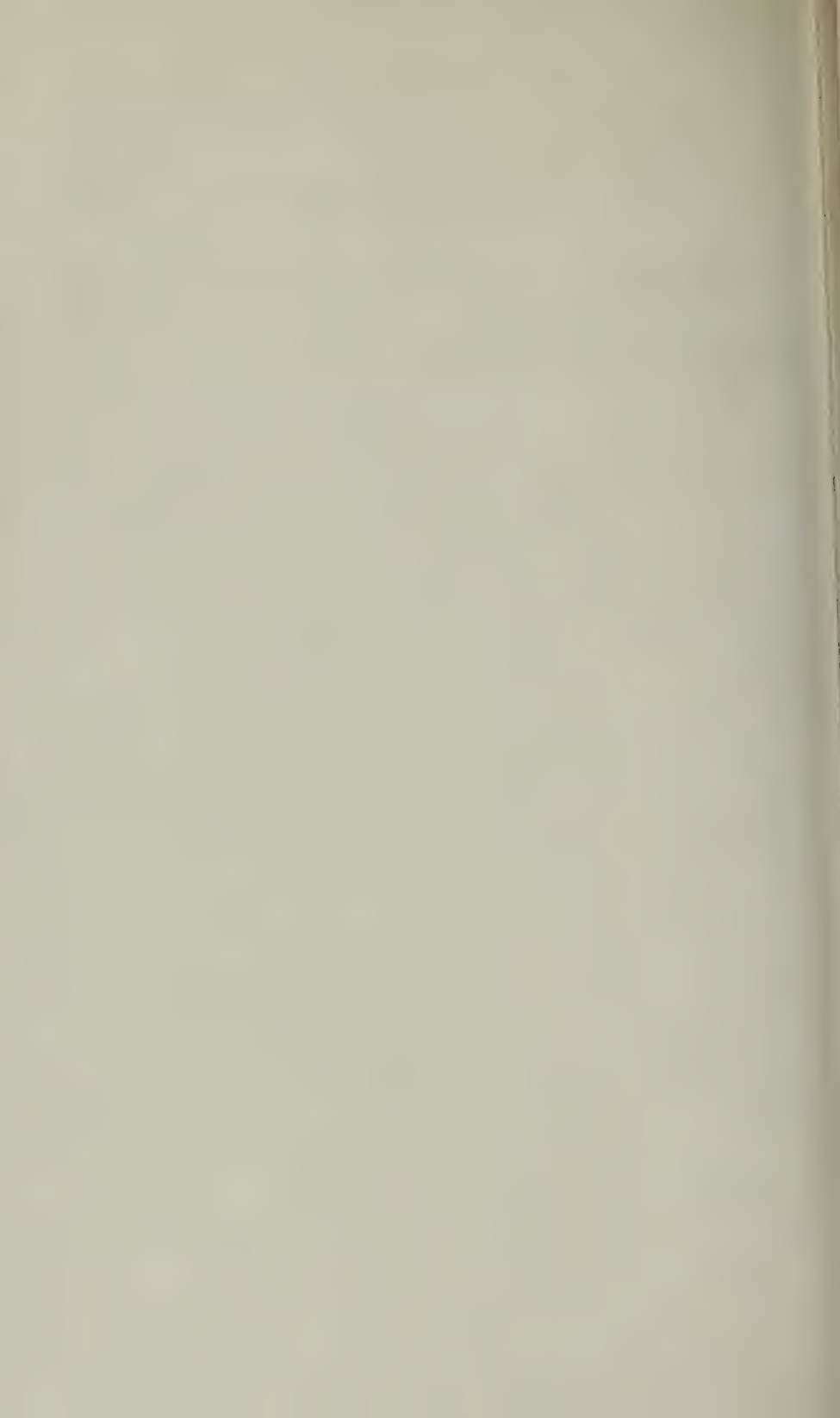
United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC COAST CASUALTY COMPANY, a
Corporation,
Appellant and Plaintiff in Error,
vs.
S. G. HARVEY,
Appellee and Defendant in Error.

Transcript of Record.

Upon Appeal from and Writ of Error to the Southern
Division of the District Court of the United
States for the Northern District of
California, Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, in and
for the Ninth Judicial Circuit, Northern Dis-
trict of California, Second Division.*

No. 320—IN EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a
Corporation,

Defendant.

Order Appointing Receiver.

The application for the appointment of a Receiver of the property of the defendant herein coming on to be heard and all parties to the controversy uniting in the request therefor;

IT IS HEREBY ORDERED that John C. Lynch of the city of Berkeley, in the State of California, be, and he is, hereby appointed receiver of this Court of all and singular the lands, tenements, and hereditaments of the said Pacific Coast Casualty Company, and of all the personal assets thereof, of every kind, including all sum, or sums, of money due and payable or to become due and payable to it, and all of its office furniture, books of account, and other personal property of every name, nature and description and all of the stocks, bonds and obligations, choses in action, accounts and rights under contracts now owned or possessed, by said corporation, together with all its corporate rights, franchises, incomes and profits of every description in this district, to have and to hold the same as an

officer of and under the orders and directions of this Court.

That said Receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, and to continue the business of said corporation and every part and portion thereof, and to conserve the property of said corporation so that it may be safely and advantageously employed.

Each and every of the officers, directors, agents and [1*] employees of the said Pacific Coast Casualty Company within this district, and all other persons or corporations therein, are hereby required and commanded forthwith upon demand of the said Receiver to turn over and deliver to such Receiver, or his duly constituted representative, any and all property, books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, stocks, bonds or other obligations, or other property, in his or their hands, or in his or their control belonging to said defendant corporation.

The said Receiver is hereby fully authorized to institute and prosecute such suits as may in his judgment be necessary for the protection of the property and the trusts that are vested in him, and to defend any and all actions instituted against him as such Receiver, and also to appear in and conduct the prosecution or defense of any and all actions now pending or hereafter commenced in Court within this district by or against the said Pacific Coast Casualty Company.

*Page-number appearing at foot of page of original certified Transcript of Record.

The said Receiver is hereby authorized and directed, out of the moneys coming into his hands, to pay and discharge all amounts due to employees of said corporation in said district accrued or to accrue upon the current pay-roll, and pay all usual and ordinary expenses necessary to carry on the usual business and operations of said corporation without the special order of the Court.

The said Receiver is hereby directed to file with the clerk of the Court, within five (5) days from date, a proper bond, the sureties to be approved by the clerk of this Court, in the penal sum of FIFTY THOUSAND (\$50,000) DOLLARS.

All creditors of said Pacific Coast Casualty Company within this district are hereby enjoined from in any way interfering with, transferring, selling, or disposing of any of the property of said corporation, or from taking possession of, or in any way interfering with, the same, or any part thereof, or from interfering [2] in any manner whatever with the possession or management of any part of the said property, or interfering in any manner to prevent the discharge of the duties of said Receiver, or to control in any way, except to transfer, convey and turn over the same to said Receiver.

Said Receiver may from time to time apply to this Court for further orders authorizing him to perform such other acts and duties not covered hereby as may be necessary for the proper discharge of his trust.

Dated December 6th, 1916.

WILLIAM C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 6, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [3]

[Title of Court and Cause.]

Petition for Order to Show Cause.

Now comes S. G. Harvey, a citizen and resident of the Northern District of the State of California, by the undersigned, her solicitors, and respectfully shows to the Court:

That petitioner is a creditor of Pacific Coast Casualty Company, a corporation, the defendant above named; that the particulars of her claim against the said insolvent corporation and the Receiver thereof are set forth in the claim hereto annexed and in the exhibits attached to and referred to in said claim, and petitioner hereby refers to the said claim and to the said exhibits thereto attached and incorporates the same herein by reference.

That on the 15th day of January, 1917, petitioner caused her said claim to be presented to John C. Lynch, the Receiver of the above-named corporation defendant; that the said receiver thereafter rejected and refused to allow and even since has rejected and refused to allow the said claim.

WHEREFORE, petitioner prays for leave of the Court to file this petition in the above-entitled proceeding and for an order of the Court herein directing that an order to show cause be made, the same to be returnable at the time and place to be fixed by the Court ordering and directing John C. Lynch, as Receiver of Pacific Coast Casualty Company, to show cause why he should not allow the said claim of

petitioner to be paid in due course of the administration of the affairs of the said corporation, and for such other, further or additional relief as shall be meet and proper in equity.

And petitioner will ever pray.

S. C. HARVEY,

Petitioner.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Solicitors for Petitioner.

NATHAN MORAN,

Of Counsel. [4]

In the Southern Division of the United States District Court for the Northern District of California.

No. 320—IN EQUITY.

COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY (a Corporation),

Defendant.

Creditor's Claim.

To the Honorable District Court Above Named, and to John C. Lynch, Esq., as Receiver of Pacific Coast Casualty Company (a Corporation):

Now comes S. G. Harvey, a creditor of Pacific Coast Casualty Company, defendant above named, and presents to the above-entitled court and to the above-named receiver, her claim against Pacific

Coast Casualty Company, a corporation, as follows:
Pacific Coast Casualty Company,

To S. G. Harvey, Dr.

To costs and disbursements in the case of B. S. Stowe, Trustee, etc., Plaintiff, vs. S. G. Harvey et al., Defendants.....\$773.20
To interest accruing on the above amount at 7% per annum from the 18th day of November, 1914, until payment.....
Total.....\$

The particulars of the foregoing claim are as follows:

On or about the 11th day of January, 1912, there was commenced in the District Court of the United States for the Northern District of California, First Division, a suit entitled "B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Plaintiff, vs. J. Downey Harvey, S. G. Harvey, et al., Defendants." On the 19th day of September, 1913, in said suit, Judgment was entered in favor of the plaintiff therein and against the [5] defendant S. G. Harvey; that thereafter the said S. G. Harvey took an appeal in said action to the United States Circuit Court of Appeals for the Ninth Circuit, which said appeal was numbered 2401 and entitled "S. G. Harvey, Appellant and Plaintiff in Error, vs. B. S. Stowe, as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appellee and Defendant in Error."

The United States Circuit Court of Appeals, on the 18th day of November, 1914, duly gave and made, and caused to be filed and entered, its Decree revers-

ing the Judgment and Decree of the said District Court and with directions to the said District Court to dismiss the said cause, and further ordering, adjudging and decreeing that the appellant and plaintiff in error recover against the appellee and defendant in error for her costs therein expended and for execution therefor. A copy of said Decree is hereunto annexed, marked Exhibit "A," and is hereby referred to and made a part hereof.

Thereafter the said B. S. Stowe, as Trustee, as aforesaid, took an appeal from the said Decree of the United States Circuit Court of Appeals to the Supreme Court of the United States, and upon said appeal procured to be executed, approved and filed in his behalf by Pacific Coast Casualty Company a bond in the sum of \$5,000.00, conditioned to answer all damages and costs if he failed to make said appeal good. A copy of said bond is hereunto annexed, marked Exhibit "B," and is hereby referred to and made a part hereof.

Upon hearing and submission of the said cause the United States Supreme Court affirmed the Decree of the United States Circuit Court of Appeals for the Ninth Circuit hereinabove mentioned and referred to, and on the 11th day of July, 1916, the District Court of the United States for the Northern District of California made its Order dismissing the said action of Stowe vs. Harvey. A copy of said Order is hereunto annexed, marked Exhibit "C," and is hereby referred to and made a part hereof. [6]

Thereafter the said S. G. Harvey filed in the said District Court her Memorandum of Costs and Disbursements and the same were by the clerk of the said

Court taxed at \$773.20; that the plaintiff in said action thereafter gave notice of a motion to retax said costs, and upon a hearing by the Court the said motion to retax was denied and the Order of the clerk taxing said costs at \$773.20 was affirmed.

That said S. G. Harvey has frequently demanded of the said B. S. Stowe, as Receiver, as aforesaid, payment of the said costs, but the same has not nor has any part thereof been paid, nor has any interest thereon been paid.

WHEREFORE, said claimant prays that her claim as aforesaid be allowed by the Receiver herein and be allowed and filed in the above-entitled court and proceeding to be paid in due course of administration.

S. G. HARVEY,
Claimant.

CHARLES S. WHEELER, and
JOHN F. BOWIE.

Attorneys for Claimant. [7]

Exhibit "A"—Decree C. C. A., Harvey v. Stowe, etc.

EXHIBIT "A."

United States Circuit Court of Appeals, Ninth Circuit.

No. 2401.

S. G. HARVEY,
Appellant and Plaintiff in Error.
vs.

B. S. STOWE, as Trustee in Bankruptcy of the
Estate of J. DOWNEY HARVEY, a Bank-
rupt,

Appellee and Defendant in Error.

DECREE.

Appeal from and writ of error to, the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States, for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED, AND DECREED by this Court that the Decree of the said District Court in this cause be and hereby is reversed, with costs in court below in favor of the appellant and plaintiff in error and against the appellee and defendant in error, and with directions to the said District Court to dismiss the cause.

It is further ORDERED, ADJUDGED AND DECREED by this Court that the appellant and plaintiff in error recover against the appellee and defendant in error for her costs herein expended, and have execution therefor.

[Endorsed]: "Approved by Wolverton, D. J. Filed and entered November 18, 1914. F. D. Monckton, Clerk." [8]

**Exhibit "B"—Bond on Appeal from Decree C. C. A.
to Supreme Court U. S. in Stowe v. Harvey.**

EXHIBIT "B."

*In the Circuit Court of Appeals for the United
States, in and for the Ninth Circuit.*

No. 2401.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of **J. DOWNEY HARVEY**, a Bankrupt,
Appellant,

vs.

S. G. HARVEY,

Appellee.

**BOND ON APPEAL FROM DECREE OF CIR-
CUIT COURT OF APPEALS TO THE
SUPREME COURT OF THE UNITED
STATES.**

Know All Men by These Presents: That the Pacific Coast Casualty Company, a corporation duly organized under the laws of the State of California, is held and firmly bound unto S. G. Harvey, in the full and just sum of Five Thousand Dollars (\$5,000.00), gold coin of the United States of America, to be paid to said S. G. Harvey, her attorneys, executors, administrators or assigns, to which payment well and truly to be made said corporation does hereby bind itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 15th day of December, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, the appellant in the above-entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit, on the eighteenth day of November, 1914, in the action wherein B. S. Stowe, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, was complainant, and S. G. Harvey was defendant; and

WHEREAS, said appellant has obtained from the said Court an Order allowing an appeal to the Supreme Court of the [9] United States to reverse said decree of the United States Circuit Court of Appeals in the aforesaid suit, and a citation directed to S. G. Harvey, citing and admonishing her to be and appear at the United States Supreme Court, to be holden at Washington, District of Columbia;

NOW, THEREFORE, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then the above obligation shall be void; otherwise, to remain in full force and effect.

PACIFIC COAST CASUALTY COMPANY.

[Official Seal]

By R. W. STEWART,
Attorney in Fact.

The foregoing bond is approved in form, and the sufficiency of the surety therein named is hereby approved, this 15th day of December, A. D. 1914.

(Signed) WM. C. VAN FLEET,
Judge. [10]

Exhibit "C"—Order Dismissing Action in District Court in Stowe v. Harvey.

EXHIBIT "C."

In the District Court of the United States for the Northern District of California, First Division.

No. 15,222.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, Bankrupt,
Plaintiff,

vs.

J. DOWNEY HARVEY, JOHN DOE, RICHARD
ROE, and JAMES BLACK, and S. G.
HARVEY,

Defendants.

ORDER DISMISSING ACTION.

On reading and filing the Mandate of the Supreme Court of the United States, and in compliance therewith, on motion of attorneys for the defendant, S. G. Harvey,

IT IS HEREBY ORDERED that the above-entitled action be, and the same hereby is, dismissed, and that the defendant S. G. Harvey have and recover judgment against the said defendant for her costs herein and for her costs and disbursements expended in the United States Circuit Court of Appeal.

And WHEREAS, on November 21st, 1913, in compliance with the order of this Court allowing an appeal, said defendant S. G. Harvey deposited with the clerk of this court Certificate No. 83, for 546 shares

of the capital stock of Shore Line Investment Company, a corporation, the same to be held in part lieu of a supersedeas bond on appeal,—

NOW, THEREFORE, the clerk of this Court is hereby directed to deliver to J. F. Bowie, one of the attorneys for S. G. Harvey, the said certificate of stock upon said J. F. Bowie giving proper receipt therefor.

Dated July 11th, 1916.

(Signed) M. T. DOOLING,
Judge.

Due service and receipt of a copy of the within — this 15th day of Jan., 1917, is hereby admitted.

JNO. C. LYNCH,
Receiver. [11]

[Endorsed]: In the United States District Court for the Northern District of California, Second Division. Filed Apr. 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy. [12]

[Title of Court and Cause.]

Order Granting Leave to File Petition and to Show Cause.

On reading the petition of S. G. Harvey presented herein, IT IS ORDERED that the same be filed and on motion of Charles S. Wheeler and John F. Bowie, solicitors for petitioner, it is HEREBY ORDERED that a copy of the same, together with a copy of this order, be served upon the said John C. Lynch, as Receiver, or upon his solicitor of record herein in the above-entitled suit, on or before the 26th day of

April, 1917, and that the said John C. Lynch, as receiver of Pacific Coast Casualty Company, a corporation, be and appear before our District Court of the United States within and for the Southern Division of the Northern District of the State of California, Second Division, on Monday, the 30th day of April, 1917, to show cause, if any he have, why he should not allow the claim of S. G. Harvey as a creditor of said Pacific Coast Casualty Company, as heretofore presented to him and as attached to the said petition filed herein.

IT IS FURTHER ORDERED that service hereof be made by a competent person on or before the day first above named and due return hereon on or before the appearance day above noted.

WITNESS MY HAND this 26th day of April, A. D. 1917.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Apr. 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

At a stated term, to wit, the March term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 30th day of April, in the year of our Lord, one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 320—EQUITY.

DANIEL COMBS

vs.

PACIFIC COAST CASUALTY CO.

(Order Submitting Petition, etc.)

Ordered that the Receiver's petition for order to withdraw bond coupons be continued to May 14, 1917. After arguments, it was ordered that the petition for order allowing claim of S. G. Harvey be submitted on points to be filed in 2 days *and 2 days*. [14]

At a stated term, to wit, the July term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 15th day of August, in the year of our Lord, one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 320—EQUITY.

DANIEL COMBS

vs.

PACIFIC COAST CASUALTY CO.

(Order Allowing Claim of S. G. Harvey, etc.)

The petition of S. G. Harvey, for order directing the Receiver to allow her claim, heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that

said claim be allowed with interest from the date on which the cost bill was taxed by the Court. [15]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 320—IN EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a
Corporation,

Defendant.

Engrossed Bill of Exceptions and Statement on Appeal.

BE IT REMEMBERED: That the plaintiff in the above-entitled action filed in the above-entitled court, his petition setting out good cause why a receiver should be appointed for the defendant corporation, which said petition was duly served upon said defendant, and said defendant appeared in court and answered the same, whereupon, after due proceedings had, the above-entitled court duly and regularly made and gave its order and caused the same to be entered and filed, and regularly appointing John C. Lynch, Esq., Receiver of the Pacific Coast Casualty Company, a corporation; that thereafter said John C. Lynch duly and regularly qualified as said Receiver, and that he ever since has been and now is the duly and regularly appointed, qualified and acting Receiver of the Pacific

Coast Casualty Company, a corporation; that after the appointment of said John C. Lynch as receiver for said Pacific Coast Casualty Company, one, S. G. Harvey, presented to said Receiver her petition for allowance of claim against said Pacific Coast Casualty Company in the amount of \$773.20 and interest; that said Receiver refused said claim whereupon said claimant filed a petition in the above-entitled court for the allowance thereof, which said petition, together [16] with the exhibits thereto attached, is in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Order to Show Cause.

Now comes S. G. Harvey, a citizen and resident of the Northern District of California, United States of America, by the undersigned, her solicitors, and respectfully shows the Court:

That petitioner is a creditor of Pacific Coast Casualty Company, a corporation, the defendant above named, that the particulars of her claim against said insurance corporation and the Receiver thereof are set forth in the claim hereto annexed, and in the exhibits attached to and referred to in said claim, and petitioner hereby refers to the said claim and to the said exhibits thereto attached, and incorporates the same herein by reference.

That on the 15th day of January, 1917, petitioner caused her said claim to be presented to John C. Lynch, the receiver of the above-named corporation, defendant, and that the receiver thereafter rejected and refused to allow said claim.

WHEREFORE, petitioner prays for leave of the Court to file this petition in the above-entitled proceedings and for an order of Court herein directing that an order to show cause be made, the same to be returnable at the time and place fixed by the Court, and directing John C. Lynch, as receiver of the Pacific Coast Casualty Company to show cause why he should not allow the said claim of petitioner to be paid in due course of administration of the affairs of the said corporation, and for such other, further and additional relief as shall be meet and proper in equity.

And petitioner will ever pray.

S. G. HARVEY,
Petitioner.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Petitioner.
NATHAN MORAN,
Of Counsel.

[Title of Court and Cause.]

Creditor's Claim.

To the Honorable District Court Above Named, and
to John C. Lynch, Esq., as Receiver of Pacific
Coast Casualty Company, a Corporation:

Now comes S. G. Harvey, a creditor of Pacific Coast Casualty Company, defendant above named, and presents to the above-entitled court, and to the above-named Receiver her claim against Pacific Coast Casualty Company, a corporation, as follows:

Pacific Coast Casualty Company,

To S. G. Harvey, Dr.

To costs and disbursements in the case of
B. S. Stowe, Trustee of the Estate of J.
Downey Harvey, a bankrupt, plaintiff,
versus S. G. Harvey, et al., defendants..\$773.20

To interest accruing on the above amount at
7% per annum from the 18th day of No-
vember, 1914, until payment.....

Total

The particulars of the foregoing claim are as fol-
lows:

On or about the 11th day of January, 1912, there
was commenced in the Southern Division of the
United States District Court for the Northern Dis-
trict of California, First Division, a suit entitled;
B. S. Stowe, Trustee in Bankruptcy of the Estate of
J. Downey Harvey, a Bankrupt, Plaintiff, versus
S. G. Harvey, J. Downey Harvey et al., Defendants.

On the 19th day of September, 1913, in said suit
judgment was entered in favor of the plaintiff
therein, and against the defendant, S. G. Harvey;
that thereafter the said S. G. Harvey took an appeal
in said action to the United States Circuit Court of
Appeals for the Ninth Circuit, which said appeal
was number 2401, and entitled: S. G. Harvey, Appel-
lant and Plaintiff in Error, versus B. S. Stowe, as
Trustee in Bankruptcy of the Estate of J. Downey
Harvey, a Bankrupt, Appellee and Defendant in
Error.

The United States Circuit Court of Appeals on the 18th day of November, 1914, duly gave and made and caused to be filed and entered its decree reversing the judgment and decree of the said District Court and with directions to the said District Court to dismiss the said cause, and further ordered, adjudged and decreed that the appellant and plaintiff in error recover judgment against the appellee and defendant in error for her costs therein expended, and for execution therefor. A copy of said decree is hereto annexed, marked exhibit "A," and is hereby referred to and made a part hereof.

Thereafter the said B. S. Stowe as trustee as aforesaid took an appeal from the said decree of the United States Circuit Court of Appeals to the Supreme Court of the United States, and upon said Appeal procured, to be executed, approved and filed in his behalf by Pacific Coast Casualty Company, a bond in the sum of \$5,000.00, to answer all damages and costs if he failed to make said appeal good. A copy of said bond is hereto annexed, marked exhibit "B," and is hereby referred to, and made a part hereof.

Upon hearing and submission of the said cause the United States Circuit Court of Appeals for the Ninth [18] Circuit hereinabove mentioned and referred to, and on the 11th day of July, 1916, the District Court of the United States in and for the Northern District of California, made its order dismissing said action of Stowe versus Harvey. A copy of said order is hereto annexed, marked exhibit

“C,” and is hereby referred to and made a part hereof.

Thereafter the said S. G. Harvey filed in the said District Court her memoranda of costs and disbursements and the same were by the clerk of the said court taxed at \$773.20; that the plaintiff in said action thereafter gave notice of a motion to retax said costs, and upon a hearing by the Court the said motion to retax was denied, and the order of the clerk taxing said costs at \$773.20 was affirmed.

That said S. G. Harvey has frequently demanded of said B. S. Stowe, as Receiver as aforesaid payment of the said costs, but the same have not nor has any part thereof been paid, nor has any interest thereon been paid.

WHEREFORE, said claimant prays that her claim as aforesaid be allowed by the Receiver herein, and be allowed and filed in the above-entitled court and proceeding to be paid in due course of administration.

S. G. HARVEY,
Claimant.

CHARLES S. WHEELER and
J. S. BOWIE,

Attorneys for Plaintiff.

EXHIBIT "A."

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2401.

S. G. HARVEY,

Appellant and Plaintiff in Error,

vs.

B. S. STOWE, as Trustee in Bankruptcy of the Es-
tate of J. DOWNEY HARVEY, a Bankrupt,
Appellee and Defendant in Error.

DECREE.

Appeal from and writ of error to the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, First Division, and was duly submitted. [19]

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in court below in favor of the appellant and plaintiff in error and against the appellee and defendant in error, and with directions to the said District Court to dismiss the cause.

It is further ordered, adjudged and decreed by this Court, that the appellant and plaintiff in error recover against the appellee and defendant in error for her costs herein expended, and have execution therefor.

[Endorsed]: Decree. (Approved by Wolverton, D. J.) Filed and entered November 18, 1914. (Signed.) F. D. Monckton, Clerk.

EXHIBIT "B."

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2401.

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Appellant,

vs.

S. G. HARVEY,

Appellee.

BOND ON APPEAL FROM DECREE OF CIR-
CUIT COURT OF APPEALS TO THE
SUPREME COURT OF THE UNITED
STATES.

Know All Men by These Presents: That the Pacific Coast Casualty Company, a corporation duly organized under the laws of the State of California, is held and firmly bound unto S. G. Harvey in the full and just sum of Five Thousand Dollars (\$5,000.00), gold coin of the United States of America, to be paid to said S. G. Harvey, her attorneys, executors, administrators or assigns, to which payment well and truly to be made said corporation does hereby bind itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 15th day of December, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, the appellant in the above-entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit, on the eighteenth day of November, 1914, in the action wherein B. S. Stowe, trustee in bankruptcy of the Estate of J. Downey Harvey, a bankrupt, was complainant, and S. G. Harvey was defendant, and

Whereas, said appellant has obtained from the said Court an order allowing an appeal to the Supreme Court of the United States to reverse said decree of the United States Circuit Court of Appeals in the aforesaid suit, and a citation directed to S. G. Harvey, citing and admonishing her to be and appear at the United States Supreme Court, to be holden at Washington, District of Columbia. [20]

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then the above obligation shall be void; otherwise, to remain in full force and effect.

PACIFIC COAST CASUALTY COMPANY.

(Signed) By R. S. STEWART, (Seal)

Attorney in Fact.

The foregoing bond is approved in form, and the sufficiency of the surety therein named is hereby approved, this 15th day of December, A. D. 1914.

(Signed) WM. C. VAN FLEET,

Judge.

EXHIBIT "C."

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

B. S. STOWE, Trustee in Bankruptcy of the Estate
of J. DOWNEY HARVEY, a Bankrupt,
Complainant,

vs.

S. G. HARVEY, J. DOWNEY HARVEY et al.,
Defendants.

ORDER DISMISSING ACTION.

On reading and filing the Mandate of the Supreme Court of the United States, and in compliance therewith, on motion of the attorneys for defendant, S. G. Harvey;

IT IS HEREBY ORDERED, that the above-entitled action be, and the same hereby is dismissed, and that the defendant, S. G. Harvey, have and recover judgment against the said plaintiff for her costs herein, and for her costs and disbursements expended in the United States Circuit Court of Appeals;

AND, WHEREAS: On November 21st, 1913, in compliance with the order of this Court allowing an appeal, said defendant, S. G. Harvey, deposited with the Clerk of this court certificate number 83 for 546 shares of the capital stock of Shore Line Investment Company, a corporation, the same to be held in part lieu of a *supersedeas* bond on appeal;

NOW, THEREFORE, the Clerk of this court is hereby directed to deliver to John F. Bowie, one of the attorneys for S. G. Harvey, the said certificate of stock upon said [21] John F. Bowie, giving proper receipt therefor.

Dated : July 11th, 1916.

M. T. DOOLING,
Judge.

Said petitions and the exhibits thereto were endorsed.

Filed April 26th, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

That said petition was thereupon presented to Hon. W. C. Van Fleet, Judge of the above-entitled court, who issued an Order to Show Cause thereon in the words and figures following:

[Title of Court and Cause.]

Order Granting Leave to File Petition and to Show Cause.

On reading the petition of S. G. Harvey, presented herein, it is ordered that the same be filed and on motion of Chas. S. Wheeler and John F. Bowie, solicitors for petitioner, it is hereby ordered that a copy of the same, together with a copy of this order, be served upon the said James C. Lynch, as Receiver or upon his solicitors of record herein, in the above-entitled suit, on or before the 26th day of April, 1917, and that the said James C. Lynch, as Receiver of Pacific Coast Casualty Company, a corporation, be and appear before our District Court of the United

States, in and for the Northern District of California, Second Division, on Monday, the 30th day of April, 1917, to show cause, if any he have, why he should not allow the claim of S. G. Harvey, as a creditor of said Pacific Coast Casualty Company, as heretofore presented to him and as attached to said petition filed herein.

It is further ordered that service hereof be made by a competent person on or before the day first above named and due return hereon on or before the appearance day above noted.

WITNESS my hand this 26th day of April, A. D. 1917.

W. C. VAN FLEET,
District Judge.

[Endorsed]: Filed April 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

That respondent appeared in response to said order to show cause and opposed the same upon the ground that it failed to state facts sufficient to entitle the claimant to the relief prayed for therein or to any relief. Upon the said hearing there was duly offered on behalf of the petition and received in evidence the order allowing the appeal of B. S. Stowe, as trustee in bankruptcy, to the Supreme Court of the United States, as a result of which the bond hereinabove set forth was executed, which said order was in the words and figures following, to wit:

**Order Allowing Appeal to Supreme Court U. S. and
Fixing Amount of Supersedeas Bond.**

The foregoing petition for appeal is hereby granted and it is hereby ordered that the appeal in

the above-entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed, also ordered that this shall operate as a *supersedeas* upon the petitioner filing a bond in the sum of five thousand (\$5,000) dollars.

Dated: December 14, 1914.

(Signed) WM. C. VAN FLEET,
United States *Circuit* Judge, Ninth Circuit. [23]

Likewise there was duly offered on behalf of the petitioner and received in evidence the order of the Honorable William W. Morrow, affirming the Clerk's taxation of the costs of this petitioner in the cause of Stowe vs. Harvey, for which said costs the foregoing claim of petitioner was presented for allowance, which said order is in the words and figures as follows, to wit:

"At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 21st day of July, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WM. W. MORROW, Judge United States Circuit Court of Appeals for the Ninth Circuit, sitting in the District Court, et al.

No. 15,222.

B. S. STOWE

vs.

J. DOWNEY HARVEY.

**Order Denying Motion for Retaxation of Costs, in
Stowe v. Harvey, in District Court.**

This cause came on regularly this day for hearing of the motion to retax costs herein, the same being an appeal from the taxation heretofore made by the clerk of this Court and after hearing attorneys for the respective parties herein, the Court ordered that the said motion be, and the same is hereby denied and said clerk's taxation affirmed."

Thereupon, the matter was argued by counsel for the respective parties and submitted to the Court for decision, and said Court did, thereafter, make its order in respect thereto in the words and figures following:

[Title of Court and Cause.]

Order Allowing Claim.

"August 13, 1917.

Present: VAN FLEET, District Judge.

The petition of S. G. Harvey for order directing the Receiver to allow her claim, heretofore heard and submitted, being now fully considered, and the Court having rendered its oral opinion it is ordered that said claim be allowed, with interest from the date on which the cost bill was taxed by the Court."

That said James C. Lynch, as Receiver of said Pacific Coast Casualty Company, thereupon duly excepted to said order of the Court and based said exception upon the following grounds: [24]

Exceptions of Receiver of Pacific Coast Casualty Company to Order Allowing Claim.

1. That the bond given by Pacific Coast Casualty Company, was given in a case prosecuted by B. S. Stowe, Complainant, in his capacity as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and that under the provisions of section 25c of the Bankruptcy Act said Trustee had the right to prosecute said litigation without rendering a bond, and that the order of Court requiring said bond to be given as an incident to taking said appeal was made without right and that said bond given in pursuance thereof is without consideration and void.

2. That at the time said bond was given there was no judgment of any Court made or given upon which an execution could issue and that therefore said bond was not a supersedeas bond, and that it did not have the effect to stay execution in any form or manner, and that it cannot be enforced so as to have that effect.

3. That the judgment for costs which is now sought to be enforced against said bond was not made or given or entered until long after said bond was executed; and was for costs incurred in the lower Court where the judgment had been favorable to complainant, and that all said costs and expenditures were incurred long before said bond was executed and not in reliance thereon.

4. That said bond was not given for the purpose of and did not have the effect of securing the pay-

ment of costs which had been incurred prior to the execution of said bond in a proceeding which had terminated in favor of complainant and for which costs no judgment of any kind had been entered.

On stipulation of the parties that the foregoing statement of evidence on appeal is true, complete and properly prepared, the same is hereby approved.

Dated: October 16th, 1917.

WM. C. VAN FLEET,
Judge of the District Court of the United States,
for the Northern District of California, Second
Division.

Stipulation Re Bill of Exceptions, etc.

It is hereby stipulated that the foregoing statement and bill of exceptions is true, complete and properly prepared, and that the same may be settled and allowed by the Court without notice.

A. E. SHAW and
EDWIN H. WILLIAMS,
Appearing Specially as Attorneys for the Receiver.
CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Claimant, S. G. Harvey.
NATHAN MORAN,
Of Counsel.

[Endorsed]: Filed Oct. 16, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

[Title of Court and Cause.]

**Petition for Order Allowing Appeal and Order
Allowing Appeal.**

To the Honorable Court Above Named:

The above-named defendant, Pacific Coast Casualty Company, through James C. Lynch, its Receiver, considering itself aggrieved by the order of said Court made and entered in the above-entitled matter on the 13th day of August, 1917, in favor of S. G. Harvey, petitioner, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons and upon the grounds specified in its assignment of errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, sitting at Sacramento; petitioner hereby tenders bond in such sum as the Court may require, as security for costs upon said appeal, and prays that its appeal be allowed, and that a citation issue as provided by law; and your petitioner further prays that the proper order touching security to be required of it to protect its appeal be made.

A. E. SHAW,

EDWIN H. WILLIAMS,

Solicitors for Defendant, James C. Lynch, Receiver
Pacific Coast Casualty Company, a Corporation,
Specially Appearing in this Matter.

Order Allowing Appeal and Fixing Amount of Bond.

The foregoing petition for appeal is hereby granted and the appeal is allowed upon the petitioner filing a bond in the sum of \$500, with sufficient sureties, to be conditioned as required [26] by law.

Dated: This 12 day of September, A. D. 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 12, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

[Title of Court and Cause.]

Assignment of Errors on Appeal.

Now, on this 12th day of September, 1917, comes the defendant, Pacific Coast Casualty Company, by its solicitors, and avers that the order entered in the above-entitled cause on the 13th day of August, 1917, in favor of S. G. Harvey, petitioner, is erroneous and unjust to the defendant, and files with its petition for an appeal from the said order the following assignment of errors and specifies that the said order is erroneous in each and every of the following particulars, to wit:

1. That the bond given by Pacific Coast Casualty Company was given in a case prosecuted by B. S. Stowe, complainant, in his capacity as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and that under the provisions of section 25c of the Bankruptcy Act said trustee had the right to

prosecute said litigation without rendering a bond, and that the order of Court requiring said bond to be given as an incident to taking said appeal was made without right and that said bond given in pursuance thereof is without consideration and void.

2. That at the time said bond was given there was no judgment of any Court made or given upon which an execution could issue and that therefore said bond was not a supersedeas bond, and that it did not have the effect to stay execution in any form or manner, and that it cannot be enforced so as to have that effect.

3. That the judgment for costs which is now sought to be enforced against said bond was not made or given or entered until long after said bond was executed; and was for costs incurred in the lower court where the [28] judgment had been favorable to complainant, and that all said costs and expenditures were incurred long before said bond was executed and not in reliance thereon.

4. That said bond was not given for the purpose of and did not have the effect of securing the payment of costs which had been incurred prior to the execution of said bond in a proceeding which had terminated in favor of complainant and for which costs no judgment of any kind had been entered.

WHEREFORE, the defendant, Pacific Coast Casualty Company, prays that said order be reversed and the District Court directed to dismiss the petition of said S. G. Harvey, or that such other

relief be awarded as the nature of the case demands.

BERT SCHLESINGER and

A. E. SHAW and

EDWIN H. WILLIAMS,

Attorneys and Solicitors for Defendant, Pacific
Coast Casualty Company, a Corporation.

[Endorsed]: Filed Sep. 20, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

[Title of Court and Cause.]

**Petition for Writ of Error and Order Allowing Writ
of Error.**

To the Honorable Court Above Named:

Now comes Pacific Coast Casualty Company, defendant in the above-entitled action, through James C. Lynch, its Receiver, by its attorneys, and respectfully shows that on the 13th day of August, 1917, the Court found a verdict against your petitioner in favor of S. G. Harvey, a petitioner in the above-entitled matter, and upon the said verdict an order was thereupon made and entered on said 13th day of August, 1917, against your petitioner the defendant above named, directing it to pay to said petitioner, S. G. Harvey, the sum of \$773.20 and interest thereon at the rate of seven per cent per annum from the 18th day of November, 1914, until payment.

Your petitioner, feeling itself aggrieved by the said verdict and order entered therein as aforesaid, petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit

sitting at San Francisco, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue with an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in said Circuit for the correction of the errors complained of and herewith assigned to be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs for the payment of all costs and damages upon said appeal.

A. E. SHAW,

EDWIN H. WILLIAMS,

Attorneys for Plaintiff in Error, Specially Appearing in This Matter. [30]

Order Granting Writ of Error and Fixing Amount of Bond.

Writ of error granted upon the foregoing petition, upon the petitioner filing a bond the amount of which is hereby fixed at \$500, with sufficient sureties as required by law.

Dated this 12th day of September, 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 12, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

[Title of Court and Cause.]

Assignment of Errors (on Writ of Error).

Now comes Pacific Coast Casualty Company, defendant in the above-entitled action, the plaintiff in error, and in connection with its petition for a writ of error in this case assigns the following errors upon which it relies to reverse the order entered herein on the 13th day of August, 1917, in favor of S. G. Harvey, as appears of record.

1. That the bond given by Pacific Coast Casualty Company was given in a case prosecuted by B. S. Stowe, complainant, in his capacity as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and that under the provisions of section 25c of the Bankruptcy Act said Trustee had the right to prosecute said litigation without rendering a bond, and that the order of Court requiring said bond to be given as an incident to taking said appeal was made without right and that said bond given in pursuance thereof is without consideration and void.

2. That at the time said bond was given there was no judgment of any Court made or given upon which an execution could issue and that therefore said bond was not a supersedeas bond, and that it did not have the effect to stay execution in any form or manner, and that it cannot be enforced so as to have that effect.

3. That the judgment for costs which is now sought to be enforced against said bond was not made or given or entered until long after said bond

was executed; and was for costs incurred in the lower Court where the judgment had been favorable to complainant, and that all said costs and expenditures were incurred long before said bond was [32] executed and not in reliance thereon.

4. That said bond was not given for the purpose of and did not have the effect of securing the payment of costs which had been incurred prior to the execution of said bond in a proceeding which had terminated in favor of complainant and for which costs no judgment of any kind had been entered.

WHEREFORE, plaintiff in error prays that the order of said Court be reversed and the District Court be ordered to dismiss the said petition as against plaintiff in error.

BERT SCHLESINGER,

A. E. SHAW and

EDWIN H. WILLIAMS,

Attorneys and Solicitors for Plaintiff in Error,
Pacific Coast Casualty Company, a Corporation,

[Endorsed]: Filed Sep. 20, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

[Title of Court and Cause.]

Bond on Appeal and Writ of Error.

Know All Men by These Presents: That we, James C. Lynch, as Receiver of Pacific Coast Casualty Company a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, of the State of Maryland, as surety, are

held and firmly bound to pay unto S. G. Harvey, her attorneys or successors, in the full and just sum of Five Hundred Dollars (\$500.00) to which payment well and truly to be made we bind ourselves and assigns and administrators jointly and severally by these presents.

Signed and dated this 14th day of September, A. D. 1917.

WHEREAS, lately at a regular term of the District Court of the United States for the Northern District of California, Second Division, in a proceeding pending in said court entitled as above, a final judgment was rendered against James C. Lynch, as Receiver, in favor of said S. G. Harvey, directing said Receiver to pay in due course of administration out of the assets which might come into his hands as such Receiver the claim of said S. G. Harvey against the Pacific Coast Casualty Company for the sum of Seven Hundred Seventy Three and 20/100 Dollars (\$773.20), together with interest, and it not clearly appearing whether the cause hereinabove referred to is at law, or in equity, and the said James C. Lynch as Receiver having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, together with a citation thereon in due form, and having also obtained a Writ of Error to the United States Circuit of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the judgment of the said District Court of the United States for [34] the North-

ern District of California, together with a citation thereon, in due form;

NOW, THEREFORE, the condition of the above obligation is such that if said James C. Lynch as Receiver shall prosecute his said Appeal and Writ of Error or either of them, to effect and answer all damages and costs if he fail to make his plea good then the above obligation to be void; else to remain in full force and virtue.

JOHN C. LYNCH,
Principal.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

[Corporate Seal]

By H. V. D. JOHNS,
Attorney in Fact.

By W. L. ALEXANDER,
Attorney in Fact.

Surety.

The foregoing bond on appeal and writ of error is hereby approved this 15th day of September, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sep. 15, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

[Title of Court and Cause.]

Receipt of Petition and Order Allowing Appeal, etc.

Receipt of copy of Petition and Order Allowing Appeal; Assignment of Errors on Appeal; Petition for Writ of Error; Order Allowing Writ of Error; Assignment of Errors on Writ of Error, wherein de-

defendant is appellant and plaintiff in error, and S. G. Harvey is appellee and defendant in error, is admitted this 20th day of September, 1917.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Defendant in Error, S. G. Harvey,

NATHAN MORAN

Of Counsel.

STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed Sep. 20, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

[Title of Court and Cause.]

**Amended Praecipe for Transcript on Appeal and
Writ of Error.**

To the Clerk of said Court:

Sir: Please make up, print and issue in the above-entitled cause a certified transcript of the record upon an appeal and upon a writ of error both allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit sitting at San Francisco, California, and said transcript to include the following:

1. Order appointing Receiver in the above-entitled action.

2. Petition of S. G. Harvey, together with exhibits and documents annexed thereto, filed in said action on or about April 26, 1917.

3. Order to show cause in granting leave to file said petition, filed April 26, 1917.

4. Minute order under date of 30th day of April, 1917, showing appearance of respondent in response to order to show cause, and objections made to granting of said petition.

5. Order of the Court made and entered on the 13th day of August, 1917.

6. Petition for allowance of appeal and order endorsed thereon.

7. Assignment of errors on appeal.

8. Statement of evidence on appeal, with stipulation of the parties and approval of the Judge, as annexed thereto.

9. Citation on appeal.

10. Petition for writ of error and order of allowance endorsed thereon.

11. Assignment of errors on writ of error. [37]

12. Writ of error.

13. Citation on writ of error.

14. Bond on appeal and writ of error filed or to be filed.

15. Acknowledgment of copies of petition for writ of error, assignment of errors, order allowing writ of error, petition for an appeal, assignment of errors on appeal, and order allowing appeal, which said acknowledgment was filed on the 20th day of September, 1917.

16. Stipulation for single transcript on appeal and writ of error with order of allowance by Circuit Court of Appeals endorsed thereto.

17. Amended Praecipe for transcript.

All of the above to be included in a single transcript prepared in accordance with the stipulation

and the order of the Circuit Court of Appeals endorsed thereon and to be certified under the hand of the Clerk and the seal of the Court.

You will also please transmit to the Circuit Court of Appeals with the record to be prepared as above the original citation on appeal and on writ of error.

BERT SCHLESINGER,

A. E. SHAW and

EDWIN H. WILLIAMS,

Attorneys and Solicitors for Defendant and Appellant, and Plaintiff in Error, Pacific Coast Casualty Company.

Receipt of copy admitted this 24th day of September, 1917.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for S. G. Harvey, Appellee.

NATHAN MORAN

Of Counsel for Appellee.

STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed Sep. 24, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

*In the Southern Division of the District Court of
the United States for the Northern District of
California, Second Division.*

No. 320.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a Cor-
poration,

Defendant *in* Plaintiff in Error,

Order Enlarging Return Day.

Good cause appearing therefor, it is hereby -ordered that the return day in the Citation issued herein be and the same is hereby enlarged to and including Wednesday the 14th day of November, 1917, and the plaintiff in error is hereby allowed until the 14th day of November, 1917, in which to file the record herein and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 16th, 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 16, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 320—EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a Corporation,

Defendant.

Clerk's Certificate to Record on Appeal and Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-nine (39) pages, numbered from 1 to 39, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record in the above-entitled cause and that the same constitutes the record on appeal and return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is \$15.95; that said amount was paid by the attorneys for the Receiver, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of October, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,
Deputy Clerk. [40]

*In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.*

No. 320—IN EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a Cor-
poration,

Defendant.

Citation on Appeal.

The President of the United States, to S. G. Harvey,
Greeting:

YOU ARE HEREBY CITED AND ADMON-
ISHED, to be and appear at a United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
at the City and County of San Francisco, State of
California, on the 15th day of October, 1917, being
within thirty days from the date hereof, pursuant
to an order allowing an appeal of record in the
Clerk's office of the District Court of the United
States for the Northern District of California, in
the suit brought numbered In Equity—No. 320, in
the records of the said Court, wherein Pacific Coast
Casualty Company is defendant and appellant, and
you are petitioner and appellee, to show cause if
any there be, why the order rendered against the
said defendant and appellant, Pacific Coast Casu-
alty Company, as in said order allowing appeal and
in said order mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 15th day of September, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge. [41]

[Endorsed]: In Equity—No. 320. In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division. Daniel Combs, Plaintiff, vs. Pacific Coast Casualty Company, a Corporation, Defendant. Citation on Appeal. Filed Sep. 20, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the citation on appeal admitted this 20th day of September, 1917.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Petitioner, S. G. Harvey.
NATHAN MORAN,
Of Counsel.

*In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.*

No. 320—IN EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a Cor-
poration,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable Judge of the District Court of the
United States for the Northern District of Cali-
fornia, Division No. Two, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you between Pacific
Coast Casualty Company, plaintiff in error, and S.
G. Harvey, defendant in error a manifest error has
happened to the damage of Pacific Coast Casualty
Company, plaintiff in error, as by said complaint
appears, and we being willing that error, if any hath
been, should be corrected and full and speedy jus-
tice be done to the party aforesaid in this behalf do
command you that judgment be therein given, that
under your seal you send the record and proceedings
aforesaid, with all things concerning the same, to

the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city and county of San Francisco, State of California, where said Court is sitting, [42] within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 15th day of
September, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States in
and for the Northern District of California.

By J. A. Schaertzer,
Deputy.

Allowed this 15th day of September, 1917.

WM. C. VAN FLEET,
Judge. [43]

[Endorsed]: In Equity—No. 320. In the Southern Division of the District Court of the United States, in and for the Northern District of California, 2d Division. Daniel Combs, Plaintiff, vs. Pacific Coast Casualty Company, a Corporation, Defendant. Writ of Error. Filed Sep. 20, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the within Writ of Error is hereby admitted this 20th day of September, 1917.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Defendant in Error, S. G. Harvey,
NATHAN MORAN,
Of Counsel.
STERLING CARR,
Attorney for Plaintiff.

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [44]

*In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.*

No. 320—IN EQUITY.

DANIEL COMBS,

Plaintiff,

vs.

PACIFIC COAST CASUALTY COMPANY, a Cor-
poration,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States, to S. G. Harvey,
GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at a United States Circuit
Court of Appeals, for the Ninth District, to be
holden at the city and county of San Francisco, in
the State of California on the 15th day of October,
1917, being within thirty days from the date hereof,
pursuant to a writ of error filed in the clerk's office
of the District Court of the United States, in and for
the Northern District of California, wherein Pacific
Coast Casualty Company is the plaintiff in error,
and you are the defendant in error, to show cause,
if any there be, why the judgment rendered against
the said plaintiff in error as in the said writ of error
mentioned, should not be corrected, and why speedy
justice should not be done to the party in that be-
half.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, [45] this 15th day of September, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge. [46]

[Endorsed]: In Equity—No. 320. In the Southern Division of the District Court of the United States, in and for the Northern District of California, 2d Division. Daniel Combs, Plaintiff, vs. Pacific Coast Casualty Company, a Corporation, Defendant. Citation on Writ of Error. Filed Sep. 20, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the citation on writ of error admitted this 20th day of September, 1917.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Petitioner, and S. G. Harvey.

NATHAN MORAN,
Of Counsel.

STERLING CARR,
Attorney for Plaintiff.

[Endorsed]: No. 3069. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Casualty Company, a Corporation, Appellant and Plaintiff in Error, vs. S. G. Harvey, Appellee and Defendant in Error. Transcript of Record. Upon Appeal from and Writ of Error to the Southern Division of the District Court of the United

States for the Northern District of California, Second Division.

Filed October 24, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3069

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST CASUALTY COMPANY
(a corporation),

Appellant,

VS.

S. G. HARVEY,

Appellee.

BRIEF FOR APPELLANT.

BERT SCHLESINGER,

A. E. SHAW,

EDWIN H. WILLIAMS,

Specially appearing as

Attorneys for Appellant.

No. 3069

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST CASUALTY COMPANY
(a corporation),

Appellant,

vs.

S. G. HARVEY,

Appellee.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal taken by John C. Lynch, Esq., in his capacity as Receiver of the Pacific Coast Casualty Company, a corporation, from an order allowing the claim of S. G. Harvey in the amount of seven hundred seventy-three and 20/100 dollars (\$773.20) and interest against the estate in the receiver's hands.

A writ of error was also allowed and is taken on same record.

The claim is made upon an appeal bond which was executed by the Pacific Coast Casualty Company in a proceeding entitled "B. S. Stowe, Trustee

in Bankruptcy of the Estate of J. Downey Harvey, vs. S. G. Harvey”.

In the proceeding prosecuted by Stowe as Trustee in Bankruptcy against S. G. Harvey a judgment in favor of the complainant, Stowe, had been rendered in the United States District Court. From that judgment the defendant, S. G. Harvey, took an appeal to the United States Circuit Court of Appeals of the Ninth Circuit, and, after due proceedings had, the appeal of S. G. Harvey was allowed and the judgment of the District Court was ordered reversed.

Thereupon, Stowe, Trustee, took an appeal to the United States Supreme Court, the bankruptcy statutes providing that in such a case an appeal to the United States Supreme Court was allowed as a matter of right.

It was on this appeal taken by Stowe, Trustee, from the decision of the United States Circuit Court of Appeals to the United States Supreme Court that the bond in question was given. The condition of the bond was as follows (see transcript page 24):

“If said appellant (Stowe, trustee in bankruptcy) shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good then the above obligation shall be void; otherwise to remain in full force and effect.”

This bond was executed by virtue of the order of court allowing the appeal and providing further (transcript page 28)

“That this shall operate as a supersedeas upon the petitioner filing a bond in the sum of five thousand dollars (\$5000.00)”.

The United States Supreme Court affirmed the decision of the United States Circuit Court of Appeal and sent its mandate direct to the United States District Court ordering that the action of Stowe, Trustee in Bankruptcy, against S. G. Harvey be dismissed. Thereupon that action was dismissed with costs to S. G. Harvey, and in due time the defendant filed her bill of costs in the sum of \$773.20 (no part of which was incurred subsequent to giving said bond). This amount she is now endeavoring to charge against the bond executed by the Pacific Coast Casualty Company. These are the costs incurred by the defendant before Stowe's appeal was taken. The costs incurred by her in the United States Supreme Court have been paid.

Specifications of Error.

1. The order allowing the claim of Mrs. Harvey against the Receiver of the Pacific Coast Casualty Company is erroneous for the reason that Section 25c of the Bankruptcy Act provides that Trustees in Bankruptcy shall not be required to give bond when they take appeals or sue out writs of error. Consequently, the order requiring the Trustee in Bankruptcy to give bond as a condition to allowing his appeal was in contravention of the

statute, and the bond given in pursuance of that order is without consideration and void.

2. The order allowing the claim against the receiver is erroneous for the reason that at the time the appeal from the decision of the Circuit Court of Appeals was taken by the Trustee in Bankruptcy there was no judgment in existence against him upon which an execution could issue, as the judgment of the District Court was a judgment in his favor, and that judgment was not reversed until after the whole case had been heard and decided by the United States Supreme Court. Consequently the bond given could not operate as a supersedeas as there was no possibility of a writ of execution issuing against the Trustee in Bankruptcy until after his appeal had been finally determined.

Points and Authorities for Appellant.

A TRUSTEE IN BANKRUPTCY IS NOT REQUIRED TO FILE BOND ON ANY APPEAL TAKEN BY HIM.

As a general rule every appellant is required to file a bond as a condition to taking his appeal under Section 1000 of the Revised Statute, which provides:

“Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States, or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute

his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

The provisions of this statute provide:

1. That where the writ is a supersedeas the bond shall be charged with damages and costs, and
2. Where it is not a supersedeas it shall be charged with costs only.

This provision is supplemented by Section 25c of the Bankruptcy Act, which is a special enactment conferring extraordinary privileges upon the Trustee in Bankruptcy. It provides:

"Trustees shall not be required to give bond when they take appeals and sue out writs of error."

Apparently the language of this section is so broad that Trustees in Bankruptcy are not required to give a bond in any case even though the writ operates as a supersedeas. In the following section of our brief, however, we will show that the appeal in this case did not operate as a supersedeas, so that the distinction is unimportant for the purposes of the case at bar.

We have then a plain provision of the statute which confers upon Trustees in Bankruptcy the right to take an appeal without giving a bond to cover costs. In the instant case the judge who allowed our appeal made his order requiring that a bond in the sum of five thousand dollars (\$5000.00)

be given, and that the bond operate as a super-sedeas. The making of that order, however, cannot have the effect of limiting the rights of the Trustee in Bankruptcy. It was an order which violated the terms of the statute and imposed upon the Trustee an involuntary burden which the court had no right to impose. A bond given in compliance with such an unlawful order is void, and in the lower court the respondents freely admitted that such was the case. In their brief filed in the lower court they say:

“As a matter of course if a bond is exacted by order of a court or officer where none is necessary, it will be void, on the ground that it was exacted *colore officii*.”

U. S. v. Tingey, 5 Pet. 115 at 129.”

The rule then is unquestioned that, at least in so far as the bond of the Pacific Coast Casualty Company was a bond to cover costs, it was exacted, by the judge who allowed the appeal, in defiance of the statutory privilege conferred upon Trustees in Bankruptcy. As it was exacted without right and involuntarily given by the Trustee in Bankruptcy it is void either as a statutory bond or as a common law bond, and no costs incurred in the action can be enforced against it.

Collier On Bankruptcy, 6th Edition, page 313, states that the provision of the bankruptcy statute, providing that the Trustee shall not be required to give bond when he takes appeals and sues out writs of errors, is so broad that it applies even to writs

of error issued by the United States Supreme Court on final judgment in a state court. Apparently, the provisions of the statute have been liberally construed so as to apply even to proceedings pending in a state court.

Kountz v. Hotel Company, 107 U. S. 378, at 395. There the court considers the case where an appeal bond contained a condition more onerous than that prescribed by the statute. It says:

“As the Judge had no authority to require such a condition to be inserted in the bond, and probably was not aware of its insertion in this case, and the party ought not to be deprived of his right of appeal upon the terms which the law prescribes, we should be very reluctant to hold that this was a voluntary bond knowingly entered into beyond the requirements of the statute.”

Such is the opinion of the United States Supreme Court upon a case identical in principle with that presented on this appeal.

The reason for this rule probably is that the Trustee in Bankruptcy is deemed to be an officer of court, acting under and in pursuance of an order of court, and subject at all times, to the control of the court. Such being the case there is no reason why he should not be permitted to take an appeal on the same liberal terms as those taken by the “United States or by direction of any department of the government” (Sec. 1000 Rev. St.).

**THE BOND EXECUTED BY THE PACIFIC COAST CASUALTY
COMPANY IS NOT A SUPERSEDEAS BOND.**

The condition which makes a supersedeas bond necessary is the existence of a judgment upon which an execution may issue. If there be in existence no judgment against the appellant which would justify the issuance of an execution against him there is no need of a supersedeas bond for the very simple reason that there is nothing to supersede.

See

Kountz v. Hotel Co., 107 U. S. 378 at 391;
Green Bay v. Norrie, (C. C. A.) 128 Fed. 896
aff'g 118 Fed. 923

The "just damages for delay" provided for in Rule 29 of the Supreme Court refers directly to damages caused by the delay in the issuance of the writ of execution.

Now in the instant case the decree of the lower court was in favor of the appellant who gave this bond. The decree of the lower court was the only one upon which, under any circumstances, an execution could be issued. The Circuit Court of Appeals did no more than order the lower court to reverse its decree and enter its judgment in favor of the defendant, S. G. Harvey. If a mandate should be received by the lower court upon such reversal it would be its duty to obey it and enter the decree as directed, but until such a mandate should be received and a decree entered, no execution against the Trustee in Bankruptcy could be issued. But here the Trustee in Bankruptcy was not satisfied

with the decision which the Circuit Court of Appeals had made so he himself took an appeal to the United States Supreme Court, and under the rule in equity cases such as this, the whole case was removed to the United States Supreme Court for consideration both on the law and the facts. That court reviewed the whole case, and when it reached its decision sent its mandate directly to the District Court of the United States. This was in accordance with the law and the universal practice.

Houghton v. Burden, 228 U. S. 161.

The effect of the Trustee's appeal from the decree of the Circuit Court of Appeals was to transfer jurisdiction to the Supreme Court of the United States and render it impossible for the mandate of the Circuit Court of Appeals to be issued. In fact the decision of the Circuit Court of Appeals never did have any effect, because the Supreme Court's mandate went direct to the District Court and no mandate in this particular case was ever sent by the Circuit Court of Appeals to the District Court. There never was a judgment upon which a writ of execution could issue in this case until after the lower court had reversed its decree in accordance with the mandate which it received from the Supreme Court of the United States at a time many months after the bond here in question had been executed.

Moreover, the judgment which was finally entered in favor of S. G. Harvey was for costs, and it was necessary for her to file her cost bill and have the

costs taxed in the District Court before any judgment could be entered. This was not done until after the whole case was decided by the United States Supreme Court.

In the case of *Hovey v. McDonald*, 109 U. S. 151; 27 L. Ed. 888, a prohibitory injunction was issued by the court at the request of the complainant, and the defendant in the action appealed. The defendant, believing that it was a proper case for a supersedeas, filed what purported to be a supersedeas bond.

The court held, however, that a prohibitory injunction was not the subject of a supersedeas and that the bond so filed did not have that effect. The court defines the supersedeas at page 159, where it says:

“A supersedeas, properly so called, is the suspension of the power of the *court below* to issue an execution on the judgment or a decree appealed from; or, if a writ of execution has issued, is a prohibition emanating from the court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are a requisite to call it into existence.”

The case of *Green Bay v. Norrie*, 128 Fed. 896 (C. C. A. 2nd), was one in which a prohibitory injunction had been awarded to the plaintiff by the trial court, and upon appeal the defendant gave a supersedeas bond under the mistaken impression that he could stay the operation of the injunction by so doing. The plaintiff in the case, under the

same mistaken impression, did not attempt to enforce the injunction because a supersedeas had been given, and, upon the affirmance of the judgment brought suit on the supersedeas bond. It was held that the supersedeas did not actually stay the decree of the lower court, and consequently no recovery could be had against the bond.

These authorities seem to define very clearly the province of a supersedeas bond and the conditions under which it operates. If it does not operate as a supersedeas it cannot be enforced on the elementary theory that there is no consideration for the charge against it.

The judgment, which forms the basis of the claim of S. G. Harvey against the receiver, was entered, as the record shows, some time after July 11th, 1916 (Trans., p. 13). The cost bill, which forms the basis of the judgment, was presented to the court in pursuance of the order made on that date. The bond, against which this judgment is sought to be enforced, was approved on December 15th, 1914, considerably more than a year before the judgment was entered (Trans., p. 24). How can it be said that the bond operated as a supersedeas on a judgment which was not in existence at the time the bond was executed? Such a contention is not supported by any logical principle and is contrary to all the decisions on the subject.

We respectfully submit that the order should be reversed.

Dated, San Francisco,
February 15, 1918.

BERT SCHLESINGER,
A. E. SHAW,
EDWIN H. WILLIAMS,
Specially appearing as
Attorneys for Appellant.

No. 3069.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC COAST CASUALTY COMPANY (a Corpora-
tion),

vs.

Appellant,

S. G. HARVEY,

Appellee.

BRIEF FOR APPELLEE

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Appellee.

NATHAN MORAN,
Of Counsel.

Filed this.....day of March, A. D. 1918.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

FILED
MAR 1 - 1918
F. D. MONCKTON,
CLERK.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

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|--|-------------------|------------|
| PACIFIC COAST CASUALTY COM- PANY (a corporation), | <i>Appellant.</i> | } No. 3069 |
| vs. | | |
| S. G. HARVEY, | <i>Appellee.</i> | |

BRIEF FOR APPELLEE.

Appellant is surety on a *supersedeas* bond whereby proceedings were stayed on the decree of this Court in *Harvey v. Stowe*, 219 Fed., 17, pending a further appeal to the Supreme Court by Stowe, resulting in an affirmance against him (*Stowe v. Harvey*, 241 U. S., 199).

As stated in appellant's brief, the entire claim which appellant has been ordered to allow in favor of appellee, was incurred prior to the giving of the bond, being in fact the amount of pecuniary relief awarded to appellee by the decree of this Court in *Harvey v. Stowe*, *supra*. It happens that the indebtedness arises entirely

out of costs expended by appellee in the District Court and on her appeal to this Court—a circumstance which is immaterial in holding the surety liable on the *supersedeas* bond. The liability was upon a decree “for money not otherwise secured” at the time the bond was given, so that the basis of the claim ceased to be material after it became merged in the judgment.

Appellant here seeks to avoid liability on the bond, claiming:

1. That it was not a *supersedeas* bond.
2. That it was exacted “as a condition of allowing an appeal,” contrary to the Bankruptcy Act.

The assignments of error and the argument of counsel’s brief are reducible to one principal issue, viz.: Was the bond a *supersedeas* bond?

To answer this question in the affirmative, it is hardly necessary to present argument—the record alone settles the point.

THE BOND WAS AN EFFECTIVE SUPERSEDEAS BOND.

Appellant makes no claim that the instrument was in any way defective in form as a *supersedeas* bond, inasmuch as it is conditioned in the exact language of R. S. Sec. 1000, specified for such an undertaking, and could answer no other purpose than a *supersedeas*. The claim is that it was not a *supersedeas* bond because there was nothing to supersede.

At the time the bond was approved and filed the pertinent facts were as follows:

(1) This Court had entered a decree in *Harvey v. Stowe*, 219 Fed., 17, reversing the decree of the District Court with costs in the court below in favor of appellant (Harvey), with directions to the District Court to dismiss the cause and further for costs in this Court and that appellant (Harvey) have execution therefor (Tr., p. 22).

(2) The Clerk of the District Court held in his custody (in part lieu of a *supersedeas* bond on appeal from the District Court), 546 shares of corporate stock belonging to Mrs. Harvey, which were the subject-matter of the litigation (Tr., p. 25).

As a consequence of the stay of proceedings which was procured by this bond on further appeal to the Supreme Court, appellee herein was deprived of the possession of her stock from November 18, 1914, to July 11, 1916, and for the same period prevented from procuring a dismissal of the action against her and from collecting her already accrued costs, awarded her by the decree of this Court.

Appellant's contention that in the above there was nothing to supersede, is mere subterfuge.

Under circumstances completely analogous to the above, the Supreme Court holds that a *supersedeas* bond is operative and sufficient: In a suit in the nature of trustee process, brought in the District of

Columbia, a receiver was appointed who had in his hands \$25,000 in bonds, when the Supreme Court of the District ordered the bill dismissed. An appeal to the United States Supreme Court, with *supersedeas*, was taken. Appellant, fearing that this was insufficient, moved for a special writ of *supersedeas*. In denying the motion as being unnecessary, Waite, C. J., says:

"A *supersedeas* upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.

"A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him;"

Goddard v. Ordway, 94 U. S., 672-3.

Counsel for appellant reiterate the argument that there could be no *supersedeas* because there was no judgment upon which execution could be issued. In this counsel are in error, as the decree of this Court specifically awarded both costs and execution, and had no appeal been taken to the Supreme Court, costs in this Court would have been taxed in this Court.

The specific award of execution for costs is, however, only a part of the execution of the judgment. Counsel confuse the technical "writ of execution" with the general term "execution" which signifies not merely the writ, but any means whereby a judgment or decree is carried into effect.

National Foundry etc. Works v. Oconto Water Co., 52 Fed., 43, 55.

In the opinion just cited it is pointed out that many decrees in equity are self-executing. The decree of this Court in *Harvey v. Stowe*, *supra*, partook largely of this self-executing character, in that the main relief, i. e. the release of Mrs. Harvey's impounded stock, followed automatically from the decree of dismissal. The facts involved in *Goddard v. Ordway*, *supra*, were of precisely the same character.

The term *supersedeas* has likewise two uses. In its narrower sense it signifies a writ specifically staying a proceeding at law. In its more general sense it includes any act or procedure which has the effect *proprio vigore*, of suspending or staying proceedings whether at law or in equity. In particular it is applied to the statutory procedure, ancillary to appeals and writs of error, whereby the power of the lower court to carry into effect the judgment is suspended pending the decision of the appellate court.

Williams v. Bruffy, 102 U. S., 249;

Dulin v. Pacific Wood etc. Co., 98 Cal., 304,
 306;
 37 Cyc., 597;
 3 C. J., 1272.

Had counsel quoted further from *Hovey v. McDon-ald*, 109 U. S., 150, this distinction would have been apparent—pages 160-1.

It is also wholly unimportant that appellee's costs had not been taxed at the time the bond was given. They had all been incurred and fell within the maxim, *Id certum est quod certum reddi potest*. Their taxation was a mere formality, but was one of the very proceedings stayed by the bond on which this appellant was surety.

Counsel's argument that there was no judgment upon which execution could issue is therefore both incorrect in its premises of fact, and fallacious in its deductions of law.

THE BOND WAS NOT EXACTED AS A CONDITION OF AL-
 LOWING THE APPEAL, BUT SOLELY AS A CONDITION
 OF GRANTING A SUPERSEDEAS.

Counsel for appellant strive to create in the mind of the Court the impression that the bond filed in the appeal of *Stowe v. Harvey*, 241 U. S., 199, was exacted as a condition precedent to allowing the appeal. To this end the statements in appellant's brief do not correctly represent the record in at least two particulars:

Appellant's Brief.

"We have then a plain provision of the statute which confers upon Trustees in Bankruptcy the right to take an appeal without giving a bond to cover costs. In the instant case the judge who allowed our appeal *made his order requiring that a bond in the sum of five thousand dollars (\$5000.00) be given, and that the bond operate as a supersedeas.* The making of that order, however, cannot have the effect of limiting the rights of the Trustee in Bankruptcy. It was an order which violated the terms of the statute and imposed upon the Trustee an involuntary burden which the court had no right to impose" (Brief, pp. 5-6).

"Specifications of Error."

"1. The order allowing the claim of Mrs. Harvey against the Receiver of the Pacific Coast Casualty Company is erroneous for the reason that Section 25c of the Bankruptcy Act provides that Trustees in Bankruptcy shall not be required to give bond when they take appeals or sue out writs of error. Consequently, the order requiring the Trustees in Bankruptcy to give bond *as a condition to allowing his appeal* was in contravention of the statute, and the bond given in pursuance of that order is without consideration and void" (Brief, pp. 3-4).

*Transcript of Record.***"Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Supersedeas Bond.**

"The foregoing petition for appeal is hereby granted and it is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed, *also ordered that this shall operate as a supersedeas upon the petitioner filing a bond in the sum of five thousand (\$5,000) dollars.*

"Dated: December 14, 1914.

"(Signed)

"WM. C. VAN FLEET,

"United States Circuit Court Judge, Ninth Circuit."
(Tr., pp. 27-28.)

"Assignment of Errors on Appeal."

"1. That the bond given by Pacific Coast Casualty Company was given in a case prosecuted by B. S. Stowe, complainant, in his capacity as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and that under the provisions of section 25c of the Bankruptcy Act said trustee had the right to prosecute said litigation without rendering a bond and that the order of Court requiring said bond to be given *as an incident to taking said appeal* was made without right and that said bond given in pursuance thereof is without consideration and void" (Tr., pp. 33-34).

To take an appeal is one thing and to obtain a *supersedeas* pending appeal is an ancillary but entirely separate proceeding.

The failure of an appellant to supersede or stay proceedings on a judgment or decree against him in no way limits the power of the appellate court to review the proceedings.

Logan v. Goodwin, 104 Fed., 494;

Rederaktiebolaget Amie v. Universal Transp. Co., 245 Fed., 282.

Upon reversal of an executed judgment, the appellate court has power to order and to compel restitution.

Foster Federal Procedure, §712, p. 2561.

Accordingly, Stowe, in prosecuting his appeal to the Supreme Court, could have prosecuted his appeal without giving any bond for costs on appeal, by virtue of the exemption in §25c of the Bankruptcy Act.

The order of the learned District Judge who allowed the appeal specifically so provided—the allowance was unconditional and without bond. The fixing of the amount of the *supersedeas* bond was embraced in a subsequent and independent provision of the order. The privilege of a *supersedeas* was to be availed of or not at the option of Stowe. He elected to take the *supersedeas*, with the results above stated as regards this appellee.

Appellant in this case now attempts to make it appear that the bond in question was not a *supersedeas* bond, but was a bond for costs on appeal, exacted *colore officii* contrary to statute "as a condition to allowing appeal."

The extent to which the record must be distorted to lend color to the foregoing argument is obvious. Appellant's contention that the bond was unlawfully exacted is entirely without foundation in the record. The extent to which the bond was necessary as and operated as a *supersedeas*, has already been stated under the first heading of this brief.

THE FACT THAT APPELLEE'S CLAIM AROSE SOLELY OUT OF COSTS IS IMMATERIAL IN FIXING THE LIABILITY OF THE SURETY.

As stated, the claim of appellee, allowed against appellant surety had its origin in costs.

These costs, however, being merged in the decree of this Court and the order of dismissal entered in the District Court pursuant thereto, no collateral inquiry will be permitted in this proceeding as to the basis of that decree.

The bond recites the rendition and entry of the decree of this Court in *Harvey v. Stowe* (Tr., p. 11). The obligors are consequently estopped in a proceeding against them to question collaterally that decree, even on jurisdictional grounds (except where constitutional rights are involved).

Dexter-Horton v. Sayward, 84 Fed., 296.

A judgment is an entirety, whether it be for debt, for tort, and whether or not there be included therein costs as incidental thereto.

Church v. Hay, 93 Ind., 323;
Wilson v. Williams, 68 Atl., 598;
 11 Cyc., 261.

A *supersedeas* bond covers any "money not otherwise secured" awarded by the judgment or decree appealed from, as well as costs and damages on appeal.

U. S. Supreme Court Rule 29;
C. C. A. Rule 13;
American Surety Co. v. North Packing Co., 178 Fed., 810;
Rosenstein v. Tarr, 51 Fed., 368, 370;
Tarr v. Rosenstein, 53 Fed., 112;
Davis v. Patrick, 57 Fed., 909; 911;
Wood v. Brown, 104 Fed., 203, 206;
Pease v. Rathbun-Jones Eng. Co., 228 Fed., 273, 277-8.

In *Surety Co. v. Packing Co.*, *supra*, the decree appealed from was for costs only, in favor of the defendant, to the amount of \$1087.35. This was affirmed on appeal, where additional costs of \$20 were taxed, to which \$5 was added as costs after mandate in the lower court. In a suit on a *supersedeas* bond, the surety company claimed that it was liable only for the \$25 costs accruing after appeal. *Held*, and

affirmed by the Circuit Court of Appeals, that the bond operated to stay execution for the costs below and that the surety was liable for them as being "a judgment for money not otherwise secured."

American Surety Co. v. North Packing Co.,
178 Fed., 810.

The only difference between that case and this is, that here no costs on appeal to the Supreme Court or after mandate are included. To seek such additional costs might raise a question under the Bankruptcy Act which need not be imported into this case.

By way of authority to support its contentions, appellant has selected two classes of cases constituting exceptions to the general rule of *supersedeas*:

(1) *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, deals with the foreclosure of a mortgage. Consequently the judgment was not "for money not otherwise secured" and a *supersedeas* bond in the ordinary form does not secure the amount of the debt found due by the decree, nor the costs of the original suit *which were a part of the decree*.

(2) In *Green Bay Co. v. Norrie*, 128 Fed., 896, an injunction had been issued. An appeal was taken with *supersedeas*. Pending the appeal the injunction was violated, although of course the injunction was not suspended by the *supersedeas*, the continuance, suspension or modification of an injunction pend-

ing an appeal being a matter of discretion with the judge granting the same (Equity Rule 74; *Foster Federal Procedure*, §703, p. 2488). *Held*, that damages for violation of the injunction were not covered by the *supersedeas* bond, this being a collateral matter, punishable as a contempt.

Distinguishing *Kountze v. Hotel Co.*, the Circuit Court of Appeals for the Fifth Circuit says:

" . . . The bond in question was conditioned as required by the quoted provision of the statute. The decree which was so superseded was one for the payment of money. The breach of the condition of such a bond given in such a case entitles the obligee to recover, not only compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. *American Surety Co. of New York v. North Packing & Provision Co.*, 178 Fed., 810; *Wood v. Brown*, 104 Fed., 203. The ruling made in the case of *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, is not applicable here. The bond under consideration in that case was given on an appeal from an ordinary foreclosure decree. It was distinctly pointed out in the opinion rendered in that case (107 U. S., 393) that the decree appealed from was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending. Not so here, where the effect of the bond under consideration was to supersede the decree as a whole, not merely the part of it which decreed a sale of the property found to be subject to a lien, but the part of it which ordered the payment of money by the appellant to the appellee.

"Nothing contained in rule 13 of this court can be given such effect as to prevent the bond standing as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured."

Pease v. Rathbun-Jones Eng. Co., 228 Fed.,
273, 278.

cf. to the same effect

Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed., 586;

Woodworth v. Mutual Life Ins. Co., 185 U. S., 354, 362.

Notwithstanding the fundamental difference between judgments for moneys secured and for moneys not secured with relation to *supersedeas*, and the repeated decisions pointing out the distinction, counsel for appellant say that *Kountze v. Hotel Co.* is "a case identical in principle, with that presented on this appeal" (Brief, p. 7).

The only relevancy of the *Kountze* case is to emphasize the rule that a judgment is an entirety as to costs and any other relief awarded. If the main relief is otherwise secured, the costs below are likewise covered by the same security and are not covered by a *supersedeas* bond. Conversely, a *supersedeas* bond covers the amount of unsecured money awarded by the judgment or decree, including costs, or for costs alone if no other money be awarded.

Am. Surety Co. v. North Packing Co., *supra*.

This appellee seeks to recover on "a judgment for money not otherwise secured" and it matters not whether the basis of the judgment is debt, damages, interest or costs, or all four together. The bond here operated as a *supersedeas* of such judgment and appellee is entitled to recover.

BANKRUPTCY ACT 25c EXEMPTS A TRUSTEE FROM GIVING A BOND FOR COSTS ON APPEAL BUT NOT FROM GIVING SECURITY WHEN HE OBTAINS A SUPERSEDEAS.

Counsel for appellant say that "apparently" the section referred to dispenses with a *supersedeas* bond on the part of a trustee in bankruptcy.

This point they do not argue, possibly because their assignments of error do not raise the question, or possibly because there is no tenable ground to support the argument.

As the suggestion involves the construction of a statute, the Court is at liberty to consider it notwithstanding its not being assigned as error, and we shall therefore refer to it briefly.

If there is any point in the suggestion, it is remarkable that in twenty years no such judicial construction has been placed on the statute. If such has been the practice, it is even more surprising that the learned judge of the District Court should have made the order as he did, allowing the appeal unconditionally and superadding the conditional order for *supersedeas*, and that experienced counsel here appearing specially for appellant should have complied without raising the question.

Brief comparison of the statutes is however sufficient to remove any doubt as to construction:

R. S. §1000 makes general provision for the taking of security on appeal, for costs and damages or for

costs only, according as a *supersedeas* is or is not procured.

R. S. §1001 exempts the United States or any Department of the Government, in the most explicit terms, from the necessity of giving either cost or *supersedeas* bonds. A comparison of this section with the Bankruptcy provision demonstrates that not even by the most liberal construction can the same effect be given it:

Revised Statutes.

"Sec. 1001. Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court, either by the United States or by direction of any Department of the Government, *no bond, obligation, or security shall be required* from the United States, or from any party acting under the direction aforesaid, *either to prosecute said suit, or to answer in damages or costs.* In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the Department under whose directions the proceedings were instituted."

Bankruptcy Act.

"Sec. 25c. Trustees shall not be required to give bond *when they take appeals or sue out writs of error.*"

Section 25c has been only once the subject of judicial construction so far as we can discover. The case

came up on motion that a cost and injunction bond be required from a trustee in bankruptcy. The moving party argued that as the section dispenses with cost bonds on appeal, by inference it requires bonds to be given in all other cases. *Held*, that as this statute was an exception to the general rule of R. S. §1000, it was not to be extended beyond its plain terms, and that to all cases not covered by the Bankruptcy Act, the general law applies.

In re Barrett, 132 Fed., 362, 368-9.

The Court in its opinion instances other provisions of the Act referring to involuntary bankruptcies, which are not extended by construction to voluntary cases.

The "taking of an appeal" is defined:

"This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance) the appeal bond and the citation."

Credit Co. v. Ark. Cent. Ry., 128 U. S., 258, 261.

A trustee in bankruptcy would be excused from filing the appeal bond. But should he desire to procure a *supersedeas*, in addition to his appeal, he is under the same obligations as any other civil litigant, and the judge authorizing the *supersedeas* is bound to require security under R. S. 1000, 1007, and the Court Rules, exactly as in other cases.

An effort has been made for example to extend

the terms of R. S. §1001 to receivers of national banks. *Held*, that the section would not be so extended unless the receiver was acting at the direction of the Comptroller of Currency, and the funds of the Treasury Department made answerable for costs.

Platt v. Adriance, 90 Fed., 772.

A trustee in bankruptcy is merely an appointee of the creditors. He is much less a public official than is the receiver of a national bank.

If §25c is to be construed in this case, it is plain that its provisions cannot be so extended as to exempt a trustee in bankruptcy from giving a bond where he procures a *supersedeas*.

THE INCLUSION OF A SUPERFLUOUS PROVISION DOES NOT VITIATE THE ENTIRE BOND.

Appellant apparently intends to argue that the entire bond was vitiated because by its terms it was security for costs as well as damages.

Even if it be conceded that the conditions of the bond were excessive in this regard, no such enforcement is sought, and these will be rejected as surplusage and the bond held good insofar as it complies with the statute and the rules of court.

U. S. v. Bradley, 10 Pet., 343, 363-4;

D. C. v. Waggeman, 15 D. C., 328, 337.

It is not necessary here to construe the statute as to the form of *supersedeas* bond required. The "costs"

secured may be construed as referring only to accrued costs merged in the judgment appealed from. The proper construction may be that a trustee procuring *supersedeas* must incidentally waive his exemption from giving security for costs on appeal, because of the express terms of R. S. §1000 specifying both damages and costs. This however is pure speculation.

The bond here in question was conditioned as required by R. S. §1000 for a *supersedeas* bond. No recovery is sought under it except for the amount of money otherwise unsecured awarded by the decree superseded.

AN ACTUAL STAY OF PROCEEDINGS HAVING BEEN EFFECTED BY THE BOND, THERE IS FULL CONSIDERATION, AND IT IS GOOD AS A COMMON LAW OBLIGATION. FURTHERMORE, THE OBLIGORS ARE NOW ESTOPPED TO QUESTION ITS VALIDITY.

There is no question but that the bond here in question was obtained by Stowe and was accepted and acquiesced in by Mrs. Harvey as being a valid and sufficient *supersedeas* bond. There is also no question that it operated effectively as such *supersedeas* from November, 1914, to July, 1916. Under these circumstances, it cannot be avoided for want of consideration.

The first principle upon which obligors are prevented under the above circumstances from questioning the validity of the bond is that of estoppel:

"Concede that the undertaking did not operate to legally stay proceedings upon the judgment, (a point which we do not decide,) yet it in fact had that effect, and the appel-

lants received all the benefit for which their sureties contracted and were they allowed now to say that their undertaking was *nudum pactum*, gross injustice might be done to the plaintiff because he did not choose to act upon a doubtful right."

Hathaway v. Davis, 33 Cal., 161, 169;
Duncan v. Thomas, 69 Pac., 310, 311;
Portis v. Illinois Surety Co., 176 Ill. App., 590;
Granger v. Parker, 142 Mass., 186;
Lauder v. Heley, 141 N. W., 201;
Pratt v. Gilbert, 29 Pac., 965.

In many other jurisdictions such bonds are held valid as common-law obligations supported by a sufficient consideration without specific reliance upon the principle of estoppel.

Goodwin v. Bunzl, 102 N. Y., 224;
Dore v. Covey, 13 Cal., 502, 508;
Hester v. Keith, 1 Ala., 316, 319;
Tanquary v. Bashor, 42 Colo., 231; 94 Pac., 22;
Mix v. People, 86 Ill., 329;
Buchanan v. Milligan, 125 Ind., 332; 25 N. E., 349;
Gille v. Emmons, 61 Kan., 217; 59 Pac., 338;
Stephens v. Miller, 80 Ky., 47;
Healy v. Newton, 96 Mich., 228; 55 N. W., 668;
English v. Smith, 1 Neb., 670; 96 N. W., 60;
Comron v. Standland, 103 N. C., 209; 9 S. E., 317;

Braithwaite v. Jordan, 5 N. D., 196; 65 N. W.,
701;

Bulkley v. Stephens, 29 Oh. St., 620;

Coughran v. Sundback, 13 S. D., 115; 82 N.
W., 507;

Bortree v. Dunkin, 20 Wyo., 376; 123 Pac., 913.

It is submitted that the order of the District Court directing the receiver of the surety company to allow the claim upon the bond was correct and should be affirmed.

Respectfully.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Appellee.

NATHAN MORAN,
Of Counsel.

United States
Circuit Court of Appeals

For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT
COMPANY, a Corporation,

Appellant,

VS.

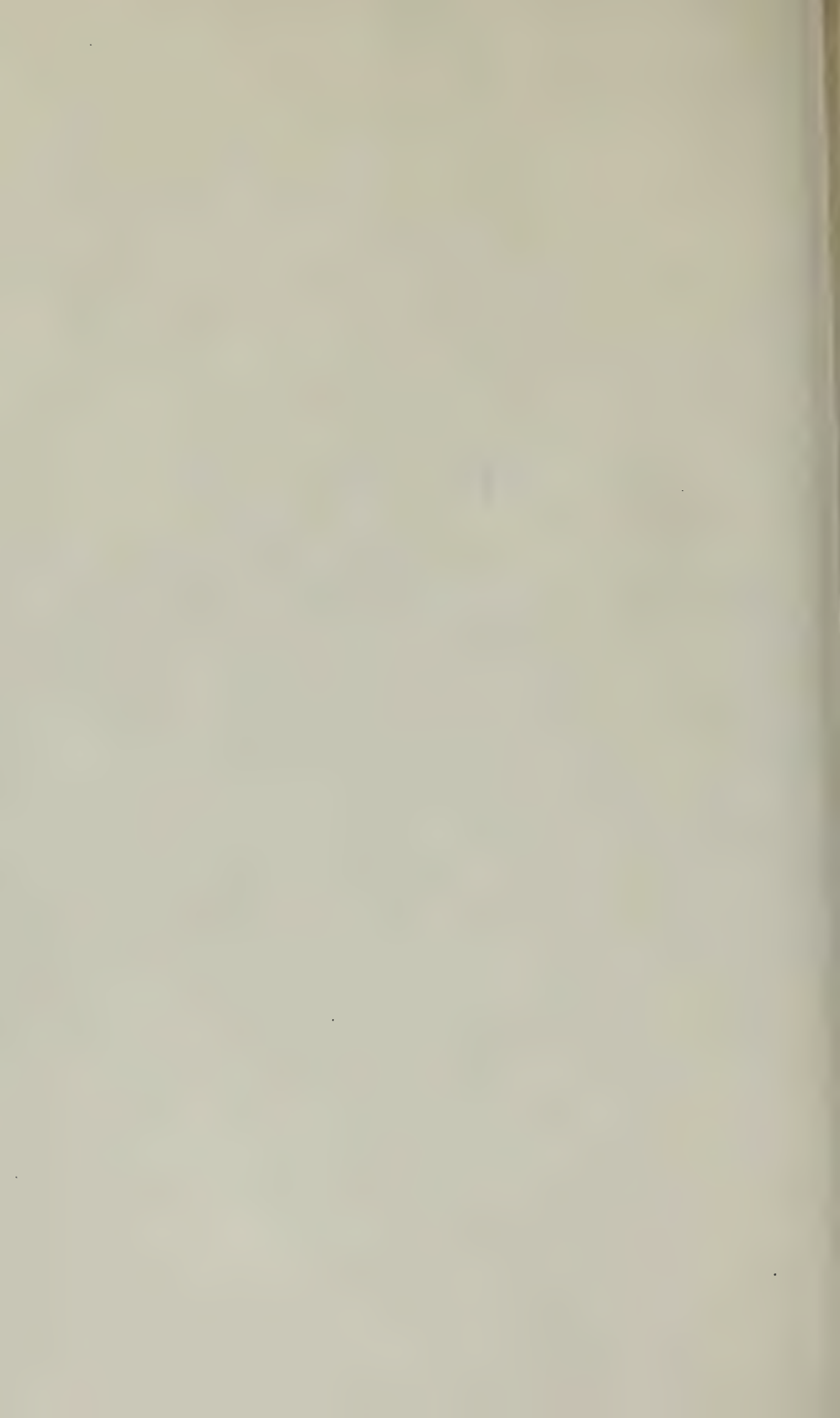
THE HAMMOND LUMBER COMPANY, a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the District of Oregon.

FILED
NOV 13 1917
F. D. MURKIN,
CLERK.



No. 3070

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHIPOWNERS AND MERCHANTS TUGBOAT
COMPANY, a Corporation,

Appellant,

vs.

THE HAMMOND LUMBER COMPANY, a Cor-
poration,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the District of Oregon.

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In the Matter of the Petition of the SHIP-OWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Names and Addresses of the Attorneys of Record.

Mr. IRA A. CAMPBELL, Merchants Exchange Building, San Francisco, California; SNOW, BRONAUGH & THOMPSON, Northwestern Bank Building, Portland, Oregon; and Mr. E. B. TONGUE, Hillsboro, Oregon, for the Appellant.

Mr. W. S. BURNETT and Mr. WILLIAM DENMAN, 260 California Street, San Francisco, California; and Mr. G. C. FULTON, Astoria, Oregon, for the Hammond Lumber Company, Appellee.

In the District Court of the United States for the District of Oregon.

No. 7220.

In the Matter of the Petition of the SHIP-OWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Statement of Clerk U. S. District Court Under Subdivision 1 of Section 1 of Admiralty Rule 4.

BE IT REMEMBERED, that on July 21, 1916, there was duly filed in the District Court of the United States for the District of Oregon a petition

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of the Shipowners and Merchants Tugboat Company, a corporation, owners of the steam tugs "Dauntless" and "Hercules," to limit liability; and on said date said petitioner filed in said court a stipulation for costs in the sum of \$250.00, with the American Surety Company of New York as surety thereon; and also on said date the court by an order duly entered in said cause fixed the amount of the stipulation to be given by said petitioner for the value of the interest of the petitioner in the said steam tugs "Dauntless" and "Hercules" at the amount of \$115,000.00; and on said date said petitioner duly filed in said court a stipulation for value in said sum of \$115,000.00, with the American Surety Company of New York as surety thereon.

On said July 21, 1916, by order entered in said cause the Court ordered that monition issue in said cause [1*] against all persons and corporations claiming damages by reason of injuries to person or property occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules" leaving the port of Astoria, Oregon, on the 9th day of September, 1911, citing them to appear before Frederick H. Drake, United States Commissioner at Portland, Oregon, on or before the 1st day of November, 1916, at 10 o'clock in the forenoon, and also citing them to appear and answer in said cause on or before said time, and further ordering that public notice of the issuance of the said monition be given by publication in a daily newspaper published in the city of Portland, County of Multnomah, State of Oregon, once a day except Sundays and holidays

*Page-number appearing at foot of page of original certified Transcript of Record.

for not less than fourteen consecutive days, and thereafter once a week until the return date fixed in said monition, and further directing that public notice of the issuance of said monition be also given by posting of said citation thereof in three public places in the city of Portland, county of Multnomah, State of Oregon, and also that service of said monition be made upon the Hammond Lumber Company, a corporation, by serving a copy thereof upon said corporation at its office in the city of Portland, State of Oregon. And thereupon on said date as directed by said order, the monition was duly issued and delivered to the United States Marshal for service and, on July 22, 1916, said monition was duly returned by the United States Marshal and filed in said court with proof of service of the same upon the said [2] Hammond Lumber Company; and thereafter, on November 1, 1916, there was filed by the United States Marshal a supplemental return upon the said monition showing that the same was published and posted in accordance with the said order of the Court.

On said July 21, 1916, by order of Court, by the Honorable Charles E. Wolverton, District Judge, duly entered therein, each and every corporation, person, or persons having or claiming to have any claims against the Shipowners and Merchants Tugboat Company or its steam tugs "Dauntless" and "Hercules," for any loss, damage or injury caused by or arising upon the voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, were enjoined and restrained until the further order of the Court from

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beginning, prosecuting or maintaining any suit or suits against the said tugs "Dauntless" and "Hercules" or the said Shipowners and Merchants Tugboat Company; the said order further enjoined and restrained until the further order of the Court the said Hammond Lumber Company, its agents, officers and attorneys from further prosecuting in the Circuit Court of the State of Oregon for Clatsop County a certain action theretofore commenced in said court of said Hammond Lumber Company against the Shipowners and Merchants Tugboat Company, wherein recovery was sought for the value of a raft and equipment lost upon said voyages of the "Dauntless" and "Hercules" referred to in the petition for limitation of liability herein; and further enjoining and restraining until the further order of the Court the Circuit Court of the State of Oregon for Clatsop County from further proceeding in the said action [3] commenced by said Hammond Lumber Company against said Shipowners and Merchants Tugboat Company; that said restraining order was duly served by the United States Marshal upon the said Hammond Lumber Company, and proof of such service was filed in said court in said cause on July 22, 1916.

No report was filed by the said Commissioner, F. H. Drake.

On October 30, 1916, there was duly filed in said cause by the said Hammond Lumber Company exceptions to the petition of the said Shipowners and Merchants Tugboat Company, and on said date said Hammond Lumber Company filed in said cause its stipulation for costs in the sum of \$200.00 with G. B.

McLeod and Jno. T. Dougall as sureties thereon.

On November 1, 1916, said Hammond Lumber Company duly filed in said cause a claim against the said Shipowners and Merchants Tugboat Company for damages, and also on said November 1, 1916, filed in said cause its answer to the petition of the said Shipowners and Merchants Tugboat Company, praying that said petition be dismissed.

On November 6, 1916, this cause came on to be heard before the Court on the answer and claim filed by said Hammond Lumber Company and the exceptions filed by said Hammond Lumber Company to the petition herein, and on said date it was ordered that the matter stand over, and that all proceedings herein be postponed until December 4, 1916, and that the exceptions to the petition be heard on the 4th day of December, 1916, unless otherwise ordered by the Court, and that the petitioner have until said 4th day of December, 1916, in which to move, plead, or except to the answer and claim filed by the Hammond Lumber Company.

On December 4, 1916, by an order entered in said cause [4] further proceedings in this cause were continued until the United States Circuit Court of Appeals for the Ninth Circuit should pass upon the application of the Hammond Lumber Company for a writ of prohibition, and that the petitioner be relieved from answering or further appearing herein until the expiration of ten days from and after the determination of said application for a writ of prohibition.

On the 20th day of July, 1917, there was duly filed in said cause a motion of the Hammond Lumber

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Company to dissolve the injunction heretofore issued in this cause against it and the Circuit Court of the State of Oregon for Clatsop County, or for the dismissal of the petition for limitation of liability herein.

Thereafter on Monday, the 23d day of July, 1917, the cause came on to be heard before the Honorable Robert S. Bean, District Judge, upon the exceptions of the Hammond Lumber Company to the petition herein, and upon the motion of the said Hammond Lumber Company to dissolve the injunction heretofore issued herein against said Hammond Lumber Company and the Circuit Court of the State of Oregon for the County of Clatsop, or for a dismissal of the petition of said petitioner to limit liability, and upon the motion made by the said petitioner in open court at the commencement of the said hearing on said date to strike from the cause the motion of the Hammond Lumber Company filed July 20, 1917, for a dissolution of the injunction or to dismiss the petition herein and to strike from the cause the affidavit and exhibits which are attached to the said motion upon the ground that said motion comes too late in the proceeding, and upon the further ground that said motion contains allegations, denials and assertions which are not properly brought before the Court in this manner, the said petitioner appearing at said hearing by Mr. Ira A. Campbell and Mr. MacCormac Snow, its proctors, and the Hammond Lumber Company appearing by Mr. W. S. Burnett and Mr. George C. Fulton, its proctors, and said exceptions and motion were taken under advisement by the Court.

On September 10, 1917, the Court filed in said cause its opinion upon said exceptions and motion, and on Thursday, [5] the 20th day of September, 1917, there was duly filed and entered in said court the final decree dismissing the petition of the said petitioner to limit its liability, but continuing the injunction in this cause for ten days to enable petitioner to perfect its appeal.

Thereafter, on September 22, 1917, by order of Court duly entered in said cause, the amount of the supersedeas bond to be given upon appeal herein was fixed at the sum of \$10,000.00. Thereafter, on the 29th day of September, 1917, said petitioner Ship-owners and Merchants Tugboat Company filed in said cause its petition for appeal and on said date filed its supersedeas bond on appeal in the sum of \$10,000.00, with William Babcock and W. J. Gray, as sureties thereon, which bond was duly approved by the Honorable Robert S. Bean, District Judge.

Thereafter on the 5th day of October, 1917, there was duly filed in said cause the cost bill of the said Hammond Lumber Company and costs thereon were taxed in the sum of \$26.10.

Afterwards, on the 19th day of October, 1917, there was duly filed in said cause the assignment of errors on appeal.

G. H. MARSH,
Clerk. [6]

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*In the District Court of the United States for the
District of Oregon.*

July Term, 1916.

BE IT REMEMBERED, that on the 21st day of July, 1916, there was duly filed in the District Court of the United States for the District of Oregon, a Petition to Limit Liability, in words and figures as follows, to wit: [7]

*In the District Court of the United States for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIPOWNERS
AND MERCHANTS TUGBOAT COM-
PANY, a Corporation, Owners of the Steam
Tugs "DAUNTLESS" and "HERCULES"
for Limitation of Liability.

**Petition of Shipowners and Merchants Tugboat
Company to Limit Liability.**

The petition of the Shipowners and Merchants Tugboat Company, a corporation, for limitation of liability, civil and maritime, respectfully shows:

I.

That petitioner herein, Shipowners and Merchants Tugboat Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintains its principal place of business in the city and county of San Francisco, said State.

II.

That petitioner now is and was at all the times

hereinafter mentioned, the owner of the American steam tugs "Dauntless" and "Hercules," together with their engines, boilers, boats, tackle, apparel, furniture and appurtenances.

III.

That heretofore on the 9th day of September, 1911, the Hammond Lumber Company, a corporation, delivered a large raft of piling to the master of petitioner's tug "Dauntless" [8] in the lower reaches of the Columbia River to be towed to the port of San Francisco, California; that said tug was made fast to said raft by means of a long steel towing hawser attached to the towing machine on said tug and fastened to said raft by means of a long heavy chain attached to said raft by the employees of said Hammond Lumber Company, who constructed said raft; that the master of said tug "Dauntless" was unable to secure the services of a bar tug to assist him with said raft out of the Columbia River and across the bar at the entrance thereof, and thereupon said master accepted the assistance of said tug "Hercules," which was made fast to said tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on said tug "Hercules" to the forward bitts of said tug "Dauntless."

That upon said tugs being made fast to each other and to the said raft, as aforesaid, they proceeded with said raft down the Columbia River from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea, and tidal conditions were favorable to a successful towing of the said raft

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across the bar; that in making said tow said tugs kept in the usual channel down the said river taken by vessels proceeding to sea, passing the usual and safe distance off and to the northward of the buoys marking the southerly side of said channel at the entrance to said river; that at or about the time when the said raft reached a point abreast of Channel Buoy Number 4, the raft and tugboats aforesaid encountered exceptionally heavy swells; that the raft was an unwieldy tow against which the said heavy swells beat with a force which the "Dauntless" and the "Hercules" could not combat; that the tide [9] was ebbing at the time in question and the force of the ebb tide was increasing at the time when said raft came abreast of Channel Buoy Number 4, and continued to increase at all times thereafter until said raft was lost, as hereinafter alleged; that by reason of the sea, swell, tide, currents, said raft sheered and bent with the waves and became wholly unmanageable; that notwithstanding said conditions the masters and crews of said tugs exerted every effort to save said raft and to tow the same to sea, but despite all the efforts so put forth, and notwithstanding the efficient and careful navigation of said tugs, said raft was gradually turned and swept broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit; that said tugs continued to pull upon said raft long after said raft had passed out of the marked channel of the river and after the tugs themselves had been pulled by said raft out of said channel and into the dangerous waters of Peacock Spit; that said tugs continued to put forth efficient efforts to save said

raft until after it had passed the Black Buoy, known as Buoy Number 1, marking the northerly side of the channel off Peacock Spit, when suddenly and without warning said raft, impelled and irresistibly controlled by said high sea and the swells and the currents appurtenant thereto, pulled the towing hawser off the towing machine on said tug "Dauntless," and thereupon said raft drifted into the breakers on Peacock Spit and a large part of the contents thereof became lost.

That thereafter said tug "Dauntless" completed its voyage to the port of San Francisco and said tug "Hercules" returned to the port of Astoria.

IV.

That said tugs "Dauntless" and "Hercules" were and are [10] used and employed by petitioner herein in the general business of towing between ports and places on the eastern shores of the Pacific Ocean and the sounds, bays, rivers, and canals adjacent thereto; that during all the times of the aforesaid towage of said raft said tugs were staunch, powerful, able and seaworthy vessels, and were at all times fully and properly manned, officered, equipped, supplied, and appareled, and were well and sufficiently fitted and supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and stores, all in good order and condition and sufficient for the business and voyage upon which they were then engaged and employed in towing said raft of piling as aforesaid; that on the voyages of the "Dauntless" and the "Hercules" described in the third paragraph of this petition no officer of your petitioner was present on

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the said tugs, or either thereof, but the said tugs were entrusted for purposes of navigation to the respective masters thereof, who were navigators of large experience, thoroughly competent, and in all respects qualified for the work so entrusted to them.

V.

That the loss of said raft of piling and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon the said voyages of said tugs were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect, of petitioner herein.

VI.

That the owner of said raft, to wit, the said [11] Hammond Lumber Company, a New Jersey corporation, maintaining offices in the Yeon building in Portland, Oregon, heretofore, and on or about the 9th day of November, 1911, commenced in the Circuit Court of the State of Oregon for Clatsop County, an action against petitioner herein, based on contentions, particularly and at large, set up in the second amended complaint of the said Hammond Lumber Company, hereinafter more particularly referred to, to the effect that the said tugs "Dauntless" and "Hercules" were negligently navigated; that the hawser whereby the said raft was attached to the "Dauntless" was insecurely fastened on the towing machine of the "Dauntless"; that the steam on the said towing machine was permitted to run down; that the said masters of the said tugs negligently refrained from calling assistance to their aid after they should have known, and did in fact

know, that the loss of the raft was inevitable in the absence of assistance because of the stress of conditions which the said tugs encountered near the mouth of the Columbia river; that in the original complaint filed in the said action damages were claimed by reason of the negligent acts of your petitioner's agents, the masters of the said tugs and the engineers thereof in the sum of \$71,249.90.

VII.

That thereafter and on or about the 27th day of February, 1912, petitioner herein filed in the United States District Court for the Northern District of California, in Admiralty, a petition for limitation of its liability wherein and whereby petitioner claimed and reserved, as authorized by Rule 56 of the Admiralty Rules of the Supreme Court of the United States, the right to contest any liability for [12] the loss of said raft, and further prayed that in case said Court should find that any liability existed upon the part of petitioner by reason of injuries to persons or loss or damage to property, done, occasioned, or incurred upon said voyages of said tugs, and particularly for the loss of said raft that such liability should not be allowed to exceed the value of said tug "Dauntless" and her freight, if any, pending, or if said Court should find that liability existed on the part of said tug "Hercules," or of your petitioner for any act or neglect of said tug, that such liability should in no event be allowed to exceed the value of said tugs "Dauntless" and "Hercules," and the freight, if any, pending, at the close of their respective voyages upon which said raft was lost;

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that upon the filing of said petition an order was entered referring said case to the Honorable James P. Brown, United States Commissioner, for the purpose of making due appraisement of the value of the interest of petitioner in said tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture, and appurtenances, as the same existed at the close of their respective voyages on which said raft mentioned in said petition was lost, together with the amount of their freight pending, if any existed; that due notice, as required in said order, was given said Hammond Lumber Company, and thereafter a hearing for the purpose of making said appraisement was held by the said Commissioner, at which petitioner and said Hammond Lumber Company produced witnesses who testified as to the value of said tugs "Dauntless" and "Hercules," and their freight, if any, pending at the close of said voyages; that upon the conclusion of the said hearing, the matter was submitted by the [13] petitioner and said Hammond Lumber Company to said Commissioner, who thereafter made his return into said court, finding and appraising the value of the interest of petitioner in said tug "Dauntless," her engines, etc., at the sum of forty-five thousand dollars (\$45,000.00), and the value of the interest of petitioner in the said tug "Hercules," her engines, etc., at the sum of seventy thousand dollars (\$70,000.00), and further finding that no freight whatsoever was pending at the termination of the respective voyages of said tugs "Dauntless" and "Hercules" upon which said raft was lost; that due

notice of the filing of the report of the said Commissioner was given said Hammond Lumber Company, and the latter not filing any exceptions to the report of said Commissioner, the said report was thereafter, and on the 29th day of March, 1912, confirmed by said Court, and the value of petitioner's interests in said tugs "Dauntless" and "Hercules," their engines, etc., at the close of said voyages upon which said raft was lost, was fixed at the respective sums of forty-five thousand dollars (\$45,000.00) and seventy thousand dollars (\$70,000.00), or a total sum of one hundred and fifteen thousand dollars (\$115,000.00).

That thereafter, on or about July 30, 1912, said Hammond Lumber Company, appeared and filed in said proceedings a claim for the loss of said raft in the sum of seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), with interest and costs, and on the same date also filed exceptions to the petition of petitioner, and prayed a dismissal of said petition, upon the grounds that said petition failed to show that the value of said tugs [14] were, or that the value of either of them was, less than the loss, damage or injury done, suffered, or incurred by reason of said acts described therein, to wit, the loss of said raft, and that hence said petition failed to show that there is, or would be, any limitation of liability; that due and regular hearing was had before said court upon said motion to dismiss, and thereafter, and on or about January 10, 1914, said Court rendered its decision and entered a final decree, dismissing said petition as

against said Hammond Lumber Company, upon the ground that if there was any liability at all, both tugs, being engaged in the same venture were equally liable, and that inasmuch as the value of said tugs exceeded the demands of said Hammond Lumber Company for the loss of said raft, the proceedings should be dismissed.

VIII.

That thereafter petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the aforesaid decree of said District Court dismissing said petition; that due presentation of said cause on appeal was made by oral argument and on written briefs, and thereafter, on November 17, 1914, said United States Circuit Court of Appeals rendered its decision therein, wherein it pointed out, in its opening statement of facts, that the value of the tugs "Dauntless" and "Hercules" were the sums of forty-five thousand dollars (\$45,000.00) and seventy thousand dollars (\$70,000.00) respectively, and the amount of the claim of the said Hammond Lumber Company for the value of said raft was the sum of [15] seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), and affirmed said decree upon the ground that, as the value of said tugs exceeded the amount of the claim of the said Hammond Lumber Company, the proceeding should be dismissed.

That thereafter a petition for rehearing was filed in said Circuit Court of Appeals by petitioner, which petition was denied, and following thereupon, the

mandate of said court was returned to said District Court and was duly entered therein.

IX.

That subsequently, and on the 18th day of November, 1915, the aforesaid cause, pending in the Circuit Court of the State of Oregon for the county of Clatsop, was brought on for trial, and during the course of the trial of said cause, and on or about the first day of December, 1915, said Hammond Lumber Company, plaintiff therein, amended its complaint, by leave of said Circuit Court of the State of Oregon, for Clatsop County, on proceedings properly had therefor, and in and by the amendment so permitted, on or about the first day of December, 1915, the said Hammond Lumber Company, enlarged its demand against your petitioner from the sum of seventy-one thousand two hundred forty-nine dollars and ninety cents (\$71,249.90), as alleged in its original complaint, and as [16] alleged in its first amended complaint, and in its claim filed in the said proceedings had for the limitation of your petitioner's liability in the United States District Court for the Northern District of California, and on which allegations as to the *quantum* of its damage, the decision so rendered in the said District Court for the Northern District of California and in the United States Circuit Court of Appeals for the Ninth Circuit, were based, to the full sum of one hundred and ten thousand nine hundred eighty-three dollars and thirteen cents (\$110,983.13), which latter sum was the amount for which the said Hammond Lumber Company claimed judgment in and by the prayer of

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its second amended complaint so filed in said Circuit Court of the State of Oregon for Clatsop County, on or about the first day of December, 1915, by leave of said Circuit Court for Clatsop County aforesaid.

That the said second amended complaint so filed by the Hammond Lumber Company contained allegations on its behalf to the effect that, as measured by the market price of piling and spars in the city of San Francisco in the month of September, 1911, the said raft, with its paraphernalia, was worth a sum in excess of one hundred and ten thousand nine hundred eighty-three dollars and thirteen cents (\$110,983.13), for which judgment was demanded; and that evidence was admitted on the trial of said cause tending to support the allegations of the said second amended complaint in that behalf; that in the prayer of said second amended complaint, the said [17] Hammond Lumber Company did not ask for interest on the said sum of \$110,983.13, but that after the said cause was submitted to the court, leave was taken by the Hammond Lumber Company to file a brief with the said court, and thereafter and on the 21st day of June, 1916, a brief was served upon your petitioner and filed with the said court, wherein the said Hammond Lumber Company, on page 48 of the said brief, alleged that its total loss in the destruction of the raft hereinbefore referred to, was the sum of \$117,288.69; that in and by said brief the said Hammond Lumber Company credited your petitioner with the sum of \$6135.47, and claimed a total loss to the Hammond Lumber Company of \$111,153.22, whereupon the said Hammond

Lumber Company, in and by its said brief, set forth the following claim, to wit: "To this should be added interest from September 9, 1911, at six per cent per annum." That the claim of the said Hammond Lumber Company, as set forth in the said brief is in excess of \$140,000, and largely exceeds the afore-said appraised value of your petitioner's interest in said tugs "Dauntless" and "Hercules" as the same existed at the close of the respective voyages on which said raft was lost.

X.

Your petitioner further shows the Court that under the law of the State of Oregon, as defined by the decisions of the Supreme Court of Oregon, which is the court of last resort therein, it is competent for the Circuit Court of the State of Oregon for Clatsop County [18] to render judgment against your petitioner in said cause in a sum in excess of \$410,000, notwithstanding the fact that the prayer for judgment contained in the second amended complaint, so filed in said action, asks for a judgment in the sum of \$110,983.13, and the costs and disbursements of the Hammond Lumber Company therein, in case the said Circuit Court of the State of Oregon for Clatsop County should determine the question of liability against your petitioner, and should also rule with the Hammond Lumber Company on its contention therein made as to the measure of damages.

Your petitioner further shows that although the said cause pending in the Circuit Court of the State of Oregon for the county of Clatsop is an action at

law, it was tried, by stipulation of the parties before the court without the intervention of a jury, and is now under advisement in the said court, and that no findings have been filed therein and no judgment entered.

Your petitioner avers that the amount in controversy in the said action exceeds the sum of \$140,000 without counting the costs and disbursements involved therein, and that the said amount in controversy largely exceeds the value of the interest of your petitioner in the said tugs "Dauntless" and "Hercules" as the same existed at the close of their respective voyages on which said raft was lost.

XI.

Your petitioner claims the benefit of the limitation of liability provided for in sections 4282 to 4289, inclusive, of the Revised Statutes of the United States, and [19] the Acts of the Congress of the United States, if any, amendatory of, and supplementary to, the several sections and acts aforesaid, or any thereof; and your petitioner is now ready, able and willing, and hereby offers to give its stipulation, with sufficient sureties, conditioned for the payment into this court by your petitioner of the value of its interest in said tugs "Dauntless" and "Hercules," and their freight, if any, pending, if and when required, as they and each of them were immediately after the termination of their said respective voyages on which said raft was lost.

XII.

That your petitioner desires to contest its liability for the injury, loss and damage, whether to

persons, or to property, caused, occasioned and incurred upon said voyages of said tugs, and particularly the loss of said raft of piling, upon the ground and for the reason that said loss and damage, and the loss of said raft, was not caused, occasioned or incurred by any act or default of your petitioner, but was *due the* following causes:

That upon said tugs being made fast to each other, as hereinbefore alleged, they proceeded with said raft down the river from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea, and tidal conditions were favorable to a successful towing of said raft across the bar; that in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and safe distance off and to the northward of the buoys marking [20] the southerly side of said channel at the entrance to said river; that at or about the time when the said raft reached a point abreast of Channel Buoy Number 4, the raft and the tugboats aforesaid encountered exceptionally heavy swells; that the said raft was an unwieldy tow against which the said heavy swells beat with a force which the "Dauntless" and the "Hercules" could not combat; that the tide was ebbing at the time in question and the force of the ebb tide was increasing at the time when the raft came abreast of Channel Buoy Number 4, and continued to increase at all times thereafter until the raft was lost as hereinafter described; that the said swells

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and seas could not have been foreseen and were not foreseen by the officers and crew of said tugs; that the masters of said tugs had made careful investigation of the conditions of weather, tide, currents, and bar, prior to the beginning of said towage service, and after diligent investigation of all said matters had been advised that the conditions were propitious for undertaking the said service; that the said incoming sea and swells made it impossible to control the navigation of said raft and to carry the same across the bar into the Pacific Ocean; that by reason of the said sea, the ebb tide and the swells aforesaid, and the unwieldly character of said raft, said raft shivered from side to side; that it bent with the waves and became wholly unmanageable; that the conditions aforesaid constituted a peril of the sea which could not have been foreseen, and which petitioner could not protect against; that notwithstanding the said conditions petitioner's tugs put forth every effort to save the said raft and to take the same to sea, but notwithstanding all of the efforts of said tugs, [21] and notwithstanding the efficient and careful navigation of the tugs which were towing the said raft, the said raft was gradually turned and carried broadside against the sea and swells until the after end of the said raft tailed off toward the breakers on Peacock Spit; that the said tugs continued to pull upon the said raft long after the said raft had passed out of the marked channel of the Columbia river and after the tugs themselves had been pulled by the raft out of the said channel and into the dangerous waters of Pea-

cock Spit; that the said tugs continued to put forth efficient efforts to save the said raft until after the raft had passed the Black Buoy, known as Buoy Number 1, and marking the northerly side of the navigable channel of said river, when suddenly and without warning the said raft, impelled and irresistibly controlled by said high sea and the swells and current appurtenant thereto, pulled the towing hawser off the towing machine on said tug "Dauntless," and thereupon the raft drifted further into the breakers on Peacock Spit, and a large part of its contents became lost.

That said tugs "Dauntless" and "Hercules" were large and powerful sea-going tugs, and were fully equipped with large and powerful towing machines of the latest improved pattern, and at the time said tugs began said towage service, and during all times thereafter, they were in every respect seaworthy in hull and machinery, and said towing machines were in every part in a thorough efficient state; that said tugs were manned with a full complement of experienced officers and crew and were commanded by competent masters of long experience in towing rafts of the character in tow, and who were in every respect familiar with the conditions of the [22] Columbia river and bar, and the channels thereof, and the condition of weather, sea, tides, and currents reasonably to be apprehended in towing said raft to sea; that the hawser with which said tug "Dauntless" was made fast to said raft was made of steel, and of size and strength sufficient to properly hold said raft under all conditions reasonably to be anti-

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icipated, and was in every respect properly fastened to said towing machine at the time said raft broke away from said tug.

That said raft was large and unwieldy, having a length of approximately seven hundred and twenty (720) feet and a draft of approximately twenty-three (23) feet, and by reason of its size and construction was unmanageable in a seaway, with the result that when caught by the ebbing tide and currents and heavy seas, said tugs, despite their size and power, were unable to keep said raft within the channel and from drifting to the northerly side thereof and upon Peacock Spit; that owing to the size and character of said raft it was impossible for said tugs to turn said raft around and return with it back up the river against the ebbing tide; that said Hammond Lumber Company well knew that the season was growing late for making a tow of said character, and well knew the dangers of the seas then likely to be encountered at the entrance of said river, but notwithstanding the knowledge so possessed, said Hammond Lumber Company assumed said risks and directed and consented that the said raft should be towed on the 9th day of September, 1911, by said tugs "Dauntless" and "Hercules," notwithstanding the dangerous navigation incident [23] to the said voyage.

XIII.

That the loss of said raft was in no respect due to any unseaworthiness or inefficiency on the part of the said tugs, or their machinery or equipment, or to any unskillfulness or negligence on the part of any of the masters, officers or crews of the said tugs, or to

any errors in the navigation thereof, but the loss was entirely due to the perils of the sea and to the inherent risks and dangers of the enterprise and to the unwieldy character of said raft, and to the manner in which said raft was constructed, and the size, weight, and length of the towing chains, and the manner in which they were made and fastened to said raft by the said Hammond Lumber Company, and to the inability of the said tugs, or any tugs, to handle the same as against the tides, currents, and swells, hereinbefore specified.

XIV.

That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioner prays:

That this Court will enter an order consenting and permitting petitioner to file a stipulation or undertaking herein, with sureties, conditioned for the payment into court of the value of petitioner's interest in the said tugs "Dauntless" and "Hercules" at the close of their aforesaid voyages upon which said raft was lost, and that this Court will, upon the filing of said stipulation by your petitioner, issue, or cause to be issued, a monition against the Hammond Lumber Company, and all other persons claiming damages of your petitioner by reason of injury [24] to persons or to property occurring or arising upon said voyages, or resulting from the loss of said raft, citing them, and each of them, to appear before this Court, and there make due proof of their respective claims, at a time to be therein named, as to all which claims your petitioner will contest its liability independent

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of the limitation of liability claimed under the statutes above stated.

That this Court may be pleased to determine that no liability exists on the part of your petitioner for any act or thing done, or occasioned by said tugs "Dauntless" and "Hercules" upon said voyages upon which said raft was lost, and particularly that no liability exists on the part of said petitioner for the loss of said raft, and that this Court may be pleased to release the aforesaid stipulation filed herein.

That in case it shall be found that any liability exists upon the part of your petitioner by reason of injury to persons, or loss or damage to property, done, occasioned, or incurred, upon said voyages, and particularly the loss of said raft aforesaid (which your petitioner denies and prays may be contested in this court), then that said liability shall in no event be permitted by this Court to exceed the aforesaid value of the interest of said petitioner in said tugs "Dauntless" and "Hercules" upon the close of said voyages upon which said raft was lost, as aforesaid, and that the moneys secured to be paid into this court, as aforesaid, shall and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants in proportion to the amount of their [25] respective claims, if any, interposed herein, as by this Court adjudged; and that in the meantime and until final judgment of this "court" shall be rendered and entered herein, an order may be entered restraining each and every corporation, person or persons, having, or claiming to have, any demands against petitioner, or said tugs

“Dauntless” or “Hercules” for any loss, damage, or injury caused by or arising upon the aforesaid voyages of said tugs “Dauntless” or “Hercules” on which said raft was lost, and particularly restraining said Hammond Lumber Company, its agents and attorneys, and said Circuit Court of the State of Oregon for Clatsop County, from further prosecuting said suit heretofore commenced in the said Circuit Court of the State of Oregon for Clatsop County, and restraining said Hammond Lumber Company, and all other persons and corporations, from prosecuting any suit against your petitioner or said tugs, or either of them, saving in this court only, in respect to the loss of said raft, and any and all claims arising on said voyages of said tugs.

And that petitioner may have and receive such other and further relief in the premises as shall be deemed meet and equitable.

SHIPOWNERS AND MERCHANTS TUG-
BOAT COMPANY.

By WALLACE McCAMANT,
Of Its Proctors.

IRA A. CAMPBELL,
WALLACE McCAMANT,
E. B. TONGUE,
SNOW, McCAMANT & BRONAUGH,
Proctors for Petitioner. [26]

District of Oregon,—ss.

I, Wallace McCamant, being duly sworn, depose and say that I am one of the proctors for the petitioner in the foregoing petition; that the allegations contained in the foregoing petition are true, as I verily believe.

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That I make this verification for the reason that no officer, owner, manager or agent of the petitioner is now within the State of Oregon.

WALLACE McCAMANT.

Subscribed and sworn to before me this 21st day of July, 1916.

[Seal]

F. J. LICHTENBERGER,
Notary Public for Oregon.

My commission expires November 15, 1919.

Filed July 21, 1916. G. H. Marsh, Clerk. [27]

And afterwards, to wit, on the 30th day of October, 1916, there was duly filed in said Court, Exceptions of Hammond Lumber Company to Petition, in words and figures as follows, to wit:
[28]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of the Petition of SHIPOWNERS
AND MERCHANTS TUGBOAT COM-
PANY, a Corporation, Owners of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

**Exceptions of Hammond Lumber Company to
Petition for Limitation of Liability.**

Now comes the Hammond Lumber Company, a corporation, claimant herein, and excepting to the petition of petitioner on file herein, avers:

That the said petition fails to disclose facts sufficient to warrant a limitation of liability in this:

(a) It shows that the claim of claimant, without

interest, at the time of the loss of the log raft in said petition pleaded, was less than the value of said two tugs at said time;

(b) It shows that there was then pending a proceeding for limitation of liability in the Northern District of California, involving the same loss of the log raft, in which the Court, with its equity powers, could have considered the alleged new facts as to the character of claimant's claim;

(c) It does not show that there are any other claims, a necessary prerequisite to the right to limit where the fund exceeds the one claim alleged. This is a matter *res adjudicata* between petitioner and claimant by virtue of a decree of the Circuit Court of Appeals, in that proceeding entitled Shipowners & Merchants Tug Boat Company v. Hammond Lumber Company, No. 2388 in said Court, and reported in 218 Fed. Rep. 161 at 165.

WHEREFORE claimant prays that said petition be dismissed with claimant's costs.

W. S. BURNETT,
WILLIAM DENMAN,

Proctors for Hammond Lumber Company.

Filed October 30, 1916. G. H. Marsh, Clerk.

[29]

And afterwards, to wit, on the 1st day of November, 1916, there was duly filed in said court a claim of the Hammond Lumber Company, in words and figures as follows, to wit: [30]

*In the District Court of the United States for the
District of Oregon.*

No. —.

In the Matter of the Petition of SHIPOWNERS
AND MERCHANTS TUGBOAT COM-
PANY, a Corporation, Owners of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Claim of Hammond Lumber Company.

Now comes Hammond Lumber Company, a corporation, claimant herein, and for its claim alleges as follows:

I.

That claimant is now, and during all of the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and engaged in business and having an office at the City of Astoria, in Clatsop County, State of Oregon, and duly registered and licensed to do business under and by virtue of the laws of the State of Oregon; and is, and during all of the times herein mentioned was, engaged in the manufacture and sale of sawlogs, spars, and products of the forest and in the construction of sea-going rafts containing piling, spars and sawlogs.

II.

That the petitioner is now, and during all the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of California, and was and is en-

gaged in the general towing business and in towing rafts from the port of Astoria in Oregon to port of San Francisco, California, and was during all the times herein mentioned the owner [31] of the steam tugboats "Dauntless" and "Hercules," each licensed to engage in and engaged in the general towage business and coastwise trade, in the United States and Pacific Ocean, and also engaged in the general business of towing rafts of piling, spars and sawlogs from the Columbia river to points in California.

III.

That on the 30th day of August, 1911, the claimant and petitioner entered into a contract wherein and whereby the petitioner agreed to and with the claimant, in consideration of the sum of Two Thousand Two Hundred and Fifty Dollars (\$2,250.00), to be paid the petitioner by claimant upon the completion of the towage hereinafter described, to safely tow for the claimant a large raft of piling and spars from Flavel, in the port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and thereupon and pursuant thereto, this claimant constructed in a first-class manner a large raft of piling and spars and completed the same on or about the 8th day of September, 1911, and bound the same together with large and heavy chains, wire rope cables and other appliances.

That said raft when completed on said date and at the time it became a total loss as hereinafter stated, contained 592,499 lineal feet of piling and spars, and the piling and spars in said raft were of the reasonable value of Ninety-eight Thousand Nine Hundred

'Sixty-eight Dollars and Fifty Cents (\$98,968.50). that said raft as completed, including the piling and spars and chains, wire cables, shackles, turn buckles, and equipment, was at said time of the full and reasonable value of One Hundred Twelve Thousand Nine Hundred Sixty-eight Dollars and Fifty Cents (\$112,968.50). [32]

IV.

That thereafter, and on the 9th day of September, 1911, pursuant to said contract aforesaid so entered into between claimant and petitioner, the claimant delivered said raft so constructed and equipped ready for sea to the petitioner at Flavel, in the port of Astoria, to be by the petitioner towed from said port to the port of San Francisco, in the State of California, and there delivered to claimant; and the said petitioner there, and on that date received and took into its possession the said raft so constructed as aforesaid, and, pursuant to said contract aforesaid, undertook to safely tow the same from said port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and there deliver same to claimant. That in order to tow the same, the said petitioner used and employed the said steam tug "Dauntless" and the said steam tug "Hercules," each of which was equipped with a towing machine. That petitioner fastened the said "Dauntless" to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless," and the other end fastened to said raft, and the said "Hercules" was fastened to the "Dauntless" with a long towing cable leading

through the forward bits of the "Dauntless" to the towing machine of the "Hercules," being thusly equipped, said two tugs started to sea with said raft on said date aforesaid; but the said petitioner so negligently and carelessly conducted itself that the said raft was entirely lost, destroyed, and became a total loss to the claimant, for at the time the said raft was delivered to the said petitioner as aforesaid, and at the time petitioner received the same and started to tow the same to the port of San Francisco under said [33] contract aforesaid, the weather and conditions on the Columbia river, ocean and Columbia river bar were favorable but there was as usual at the then stage of the tide, of which the servants and officers of petitioner in charge of said tugs had actual notice, a northward drift of the current in the waters of the said Columbia river, and at the mouth thereof, and in the said ocean, towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as Peacock Spit, a dangerous spit near the mouth of said river where the waters of the river and ocean meet and which, if struck by said raft, or if such raft should come in contact therewith or be grounded thereon would become a wreck and total loss, all of which was well known to the petitioner, its servants, masters and officers in charge of said tugboats, and all of which dangers could have been easily and readily avoided by taking the southerly side of such channel, but the said petitioner, through its servants, masters and officers in charge of said tugs, carelessly and neg-

ligently failed and neglected to, and did not, tow said raft by the southerly course through said channel as aforesaid, but carelessly and negligently attempted to tow the same along the northerly side of the channel, and over and against the said Peacock Spit, and carelessly and negligently towed said raft so close to said spit that they lost control thereof, and the same broke away from said tugs and drifted upon said spit, and the same became land and was broken and a total loss.

That at the time the said tug "Dauntless" and the said tug "Hercules" took said raft in tow, the towing machinery and appliances and the machinery and appliances to which was fastened the tow-line leading from the said tug "Dauntless" to said raft [34] and with which said tow-line was manipulated and with which said raft was towed, on said tug "Dauntless" aforesaid, was and continued to be thereafter old and worn and useless and defective, and out of repair, and the brake and brakes thereof were out of repair, and were also incapable of holding, and of insufficient strength to hold and tow said raft, and the said towing machinery and appliances on such tug "Dauntless" were, and each was, of insufficient strength to hold and tow the said raft, and particularly to hold and tow the same through the said northerly channel, and while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of the said Columbia river and near the said Peacock Spit aforesaid, and in said north channel aforesaid, by reason of said insufficient towing machinery and appliances and brake and brakes

aforesaid, and by reason of the fact that the towing machinery and appliances to which was fastened the tow-line leading from said raft aforesaid was of insufficient strength and power to hold and tow said raft, and because of the fact that the said tow-line leading from said raft and by which it was towed was not fastened to the said towing machinery on said tug "Dauntless," the said tow-line payed out and slipped loose from and became wholly detached from the said towing machinery and from said tug "Dauntless" aforesaid, and thereupon said raft drifted over and upon and against said Peacock Spit where it became wrecked and a total loss to claimant.

This claimant further avers, that at and during all the times herein mentioned, the said channel of said river, and the channel over the bar and into the said ocean, was fully one mile in width, and of sufficient depth to successfully and safely and securely tow said raft through the same to the sea. That the waters of [35] said channel gradually shallowed near said Peacock Spit, at and around which the waters are at all times very rough, and a heavy sea at all times prevails there, all of which was well known to petitioner at and during all the times herein mentioned.

That the said petitioner, by and through its said masters, and officers and navigators of said two steam tugs aforesaid, carelessly and recklessly towed said raft too close to said Peacock Spit, and into shallow water where said raft could not be successfully managed, and in great danger of destruction, although at said time there was sufficient water in the channel

of such river to safely tow said raft as aforesaid. That in making such tow as aforesaid, said petitioner, through its said officers and agents and masters of said two tugs, failed to and did not exercise maritime skill, in that said two tugboats were unskillfully and carelessly manoeuvred, the leading tug not keeping in line, so that the power thereof was not permitted to be transferred to said raft and the tow-lines on each tug were neither looked after nor watched, or cared for, but were permitted by the unskillful manoeuvring of said two tugboats, and failure to watch same, to become at times slackened, and then the full power of each tug with the added velocity of their speed thrown against the same, and such lines tightened, whereby the towing machinery of each was subjected to a great and unnecessary strain, and the raft having an unequal tow, was not at all times under control as it should have been by the exercise of ordinary maritime skill. That the towing machine on each tug was operated by steam, and required a steady high pressure of steam to successfully operate the same, but such steam pressure was permitted to run down, whereby said towing machine could not be skillfully or properly manipulated. That in order to safely tow [36] said raft, it was necessary that the tow-line running from the said raft to said "Dauntless" should have been safely and securely fastened to the towing machine by securely fastening the end of such tow-line to the flange of the drum of the towing machine thereon and winding such tow-line around such drum a sufficient number of times to maintain and keep same securely fastened

thereto and prevent same from slipping off, but by reason of the carelessness and negligence of said petitioner, such tow-line was not safely, nor was it securely fastened to the flange of the said drum wound around the same a sufficient number of times to keep same from slipping off therefrom, but was carelessly and negligently permitted to remain wholly unsecured, and allowed to pay out until wholly unwound from such drum, and held in such manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and the said raft thereby set adrift.

That while said petitioner, through its officers and masters of said two tugboats aforesaid, was towing said raft through said northerly channel, and while said raft was by reason of their carelessness and unskillfulness towed too closely to said Peacock Spit and into the shallow water, and by reason of the carelessness and negligence of the petitioner and its servants and employees and the navigators of the tugboat "Hercules" and said tugboat "Dauntless," and the unskillful manoeuvring of said tugboat "Hercules" and said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" were each improperly [37] manoeuvred and handled and allowed to become slackened and then abruptly tightened and were not cared for or watched, and by

reason of the manner in which each of said tugboats was manoeuvred, and because of the fact of insufficient steam for operating the said towing machinery on each of said tugboats and because of the fact that the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" was not securely or safely fastened, and was permitted to unwind therefrom, and that no watch was placed thereon, or care was paid thereto, the said tow-line leading from said raft to the towing machine in said tug "Dauntless" payed out and slipped loose from and became wholly detached from said towing machinery and from said tug "Dauntless," and thereupon said raft drifted over and upon and against said Peacock Spit aforesaid and was broken up and became a total loss to the claimant herein.

That after said tow-line had become released from said tugs, and after said officers and servants of petitioner in charge of said two tugs had turned same loose, and after same had become loose, said petitioner and its servants, masters and officers in charge of said tugboats had ample time and opportunity to secure said raft and tow same safely to said port of San Francisco, but carelessly and negligently refused to and did *not so*, but abandoned the same, and the same became lost as aforesaid.

This claimant further avers that long prior to the time the tow-line which was fastened to and leading from said raft became unwound from the drum of the towing machine of the said tug "Dauntless," the petitioner, through its said masters and officers in charge of said tugs "Dauntless" and "Hercules,"

well knew, and by the exercise of ordinary care and skill should have known, that because of the ground swells, waves [38] and currents which said tugs and raft encountered near the mouth of said river that said tugs could not then tow said raft to sea without aid or assistance, against such swells and waves, and that any further attempt, without assistance, to tow said raft to sea after meeting such swells, waves and currents would surely result in the loss of said raft on said Peacock Spit but the said petitioner through its masters and servants in charge of the said two tugs, nevertheless, with such knowledge and notice, carelessly, recklessly and unskillfully persisted in attempting to tow said raft against said swells, currents and waves to sea, and carelessly, recklessly and unskillfully did not call to their, or either of their, assistance, or to their, or either of their, aid, any other tug or tugs, and did not make any attempt to hold said raft until conditions were more favorable which said tugs could have done by the exercise of ordinary care and skill, and by reason thereof, and by reason of such carelessness and negligence of the said masters and officers of said tugs, the said waves, swells and currents in said river slowly and gradually drifted and caused said raft to drift northerly and towards and upon Peacock Spit where the same became a total loss as herein alleged.

That long prior to said raft becoming unfastened from said tug "Dauntless," and long prior to its said loss, the masters of said tugs "Dauntless" and "Hercules" had ample time and ample opportunity, after

it became apparent to them and after they knew said tugs could not, under the conditions then and there prevailing, tow said raft to sea, and that after they knew that unless they obtained assistance and aid the said raft would be lost, to have secured sufficient aid and sufficient assistance and sufficient tugs to have held said raft and thereby [39] saved the same, and to have towed the same to sea, for there were sufficient sea-going tugs then and there available and could have obtained by the exercise of ordinary care in ample time to have protected and saved said raft and towed the same to sea, and that because of the fact that said petitioner, through its said masters and officers of said tugs, failed and neglected to secure such aid, the said raft became a total loss, save and excepting that after said raft became lost, the same broke and *and* a number of the piling and spars drifted ashore and this claimant saved all the said piling that could possibly be saved and realized therefrom the sum of Nineteen Hundred Eighty-five Dollars and Thirty-seven Cents (\$1985.37), which was and is a fair and reasonable value of all piling and spars saved after deducting therefrom the reasonable expenses in saving the same.

Claimant therefore avers that by reason of the failure of the petitioner to perform its said contract to safely tow said raft from the port of Astoria in Oregon, to the port of San Francisco, in California, and the loss of the said raft in the manner aforesaid, this claimant became and was damaged in the sum of One Hundred Ten Thousand Nine Hundred Eighty-three Dollars and Thirteen Cents (\$110,983.13),

whether the same be made up of interest or any damage of value at any time discovered.

WHEREFORE, by reason of the premises, claimant demands judgment against said petitioner in the sum of One Hundred Ten Thousand Nine Hundred Eighty-three Dollars Thirteen Cents, together with the costs and disbursements of this action.

WILLIAM DENMAN,

W. S. BURNETT,

Proctors for Hammond Lumber Company, Claimant. [40]

State of California,

City and County of San Francisco,—ss.

I, W. S. Burnett, being duly sworn, depose and say that I am the Vice-President of the Hammond Lumber Company, and as such officer I am authorized to make this verification in its behalf; that the allegations contained in the foregoing claim are true, as I verily believe.

W. S. BURNETT.

Subscribed and sworn to before me this 30th day of October, 1916.

[Seal]

WM. D. PAGE,

Notary Public in and for the City and County of San Francisco, State of California.

Filed November 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of November, 1916, there was duly filed in said court an Answer of Hammond Lumber Company, in words and figures as follows, to wit: [42]

In the District Court of the United States for the District of Oregon.

No. —.

In the Matter of the Petition of SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Answer to Petition and Affidavit for Dismissal of Proceeding to Limit Liability.

The answer of Hammond Lumber Company, a corporation, claimant herein, to the petition for limitation of liability, respectfully alleges, admits and denies as follows:

I.

Claimant alleges that this is an equitable proceeding and that the powers of this Court are those of any court of equitable jurisdiction so far as they may effectuate the purposes of the legislation to limit liability. That the relief herein sought to be obtained, i. e., the enjoining of the State Court from proceeding with claimant's action at law pending in the Circuit Court of the State of Oregon for Clatsop County, should not in any event be granted to petitioner, unless presenting its petition with clean

hands. Claimant alleges that the facts are, and that petitioner's hands are not clean in respect thereto, as follows:

That petitioner is here seeking to obtain a limitation of liability on the theory that claimant's claim, alleged by petitioner [43] to include interest from September 9, 1911, to the filing of the petition herein, is in excess of the alleged (but not appraised) value of the fund of One Hundred and Fifteen Thousand Dollars (\$115,000) herein, without interest from the date of disaster;

That, although seeking and obtaining from this court an injunction against claimant on a petition based on this theory, it failed to disclose to the court that, at the time of filing its petition and obtaining the said injunction, there was pending in the District Court of the United States, for the Northern District of California, a limitation proceeding brought by petitioner, for its liability for the loss of the same log raft, in which the appraisement of said two tugs of petitioner and the fund for limitation, which fund consisted of two stipulations, one for each of said tugs, had been adjudicated between petitioner and claimant as at One Hundred and Fifteen Thousand Dollars (\$115,000), and interest at legal rate from September 9, 1911, and that at the time of filing the petition herein, the fund in said limitation proceeding pending in California amounted, with interest, to more than petitioner's said claim with said alleged interest.

That the fund in said pending California proceeding exceeds the amount of claim, as said amount is

alleged herein by petitioner; that the said two stipulations, including said interest, were prepared and presented by petitioner and the approval of the Judge of said court to said bonds, and interest, was obtained by petitioner and, in pursuance of the order of said court, that said bonds included such interest; that said order of said District Court of California in said limitation proceeding pending there, so fixing said amount of said fund, was by it duly given and made on or about the 29th day of March, 1912, and that the orders approving said bonds were duly given and made March 30, 1912; that petitioner at no time [44] excepted to such order, and that thereafter said orders became final as between petitioner and claimant, by a final decree entered in said proceeding, dismissing the petition as to claimant, but otherwise retaining jurisdiction of said proceeding; that thereafter petitioner did appeal from said decree to the Circuit Court of Appeals, and that said decree was affirmed by the Circuit Court of Appeals of this circuit and thereby said appraisement and the orders and said adjudication of said fund became final as between the parties hereto.

That the practice in said Northern District of California is to allow interest on the fund in limitation proceedings from the date of the disaster from which the proceeding arises.

That if petitioner had set up the cause of action for limitation against claimant as now pleaded here in said pending proceeding in California, the said District Court for the Northern District of California would have been obliged to dismiss said pro-

ceeding as to claimant, because the said fund then exceeded the claim of claimant, including the interest thereon, as said claim is described by petitioner in the petition on file herein.

That petitioner, though well knowing all these facts, and, as claimant believes, merely to evade the said appraisalment and said final adjudication of said fund in said District Court of the United States for the Northern District of California, did fail to represent to this court in said petition said facts, and did so conceal the same from this court, and did obtain the injunction herein on such concealment of facts; that such failure to disclose occurred at an *ex parte* hearing, where the Court was compelled to rely on petitioner for a full and candid disclosure by petitioner's pleadings and affidavits of all the facts affecting such right to an injunction. [45]

That said injunction was not only addressed to claimant, a private corporation, but also to the said Circuit Court of the sovereign State of Oregon for Clatsop County, and that by such failure to disclose such facts, said Circuit Court of said sovereign State has had its hands stayed and has been prevented from exercising its proper functions.

That the purpose and motive of such failure to disclose such facts was, as claimant believes, to obtain from this court a stipulation for the fund herein, with interest from the date of its filing, to wit, July 21, 1916, and then to assert that claimant's claim, with interest from September 9, 1911, was in excess of such fund herein with interest from said July 21, 1916.

That a further effect of the filing and prosecuting of these proceedings in this court is and will be to save to the petitioner the use of the moneys that may be recovered in said Circuit Court by claimant, if there successful, without interest, if petitioner succeeds in establishing the rule contended for by it, to wit, that no interest on the damages to claimant for loss of said raft be allowed; that already petitioner has prevented the prosecution of said action in said State Court for three years and a half by said proceedings in said Northern District Court of California held to have been brought improperly against petitioner.

That in said limitation proceeding in the Northern District of California it was, by the decree of said Court duly given and made and thereafter by the decree of the Circuit Court of Appeals for the Ninth Circuit affirmed, reported in 218 Federal Reporter, 161 at 165, duly adjudicated by and between petitioner and this claimant, that petitioner had no cause of action against claimant by reason of the existence of *several claims* arising from said disaster and loss of said log raft; that the fact as to such [46] adjudication nowhere appears in the petition or affidavits filed herein.

II.

Admits that the allegations of Articles I and II of said petition are true.

III.

Admits the allegations of the first paragraph of Article III, save as to the allegation therein that the master of the said tug "Dauntless" was unable

to secure the services of a bar tug to assist him with said raft out of the Columbia river and across the bar at the entrance thereof, as to which allegation and facts it is ignorant, wherefore it calls for proof thereof.

Further answering the said first paragraph of Article III, claimant alleges that the petitioner received the said log raft pursuant to a contract entered into between petitioner and claimant on the 30th day of August, 1911, whereby petitioner agreed to and with claimant, in consideration of the sum of Twenty-two Hundred and Fifty Dollars (\$2,250) agreed by claimant to be paid to petitioner upon the completion of the said towage, to safely tow for the claimant the said raft of piling and spars from Flavel, in the port of Astoria, in Oregon, to the port of San Francisco, in California; that the said raft when completed on the said date and at the time it became a total loss, contained five hundred and ninety-two thousand, four hundred and ninety-nine (592,499) lineal feet of piling and spars, and the said piling and spars were of the reasonable value of Ninety-eight Thousand, Nine Hundred and Sixty-nine and 50/100 Dollars (\$98,969.50); that the said raft as completed, including the piling and spars and the chains, wire cable, shackles, turn buckles and equipment used upon [47] and in the same to complete the said log raft for ocean towage was at the said time of the said loss of the full and reasonable value of One Hundred and Twelve Thousand, Nine Hundred and Sixty-eight and 50/100 Dollars (\$112,968.50).

Answering the second paragraph of Article III, denies that, notwithstanding the said conditions, the masters and crews of said tugs exerted every effort to save the said log raft and to tow the same to sea, and that, or that, despite all the efforts so put forth, said raft was gradually turned and swept broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit, and in that behalf alleges that the swells encountered abreast of Channel Buoy No. 4 were observable to any competent mariner for a long time prior thereto, and that at the time that petitioner reached said Channel Buoy No. 4 it well knew said raft was doomed to destruction if it continued on said voyage, and that in spite thereof said tugs continued to pull upon said raft; denies that the said tugs continued, or at all, to put forth efficient or any proper efforts to save the said raft until after it had passed the black buoy known as Buoy No. 1, or at all; denies that suddenly, without warning, or impelled and irresistibly controlled by the said high seas, swells and currents pertaining thereto, or any of them, said raft pulled the towing hawser off the towing machine of the said tug "Dauntless," and in that behalf alleges that the combined strain of the power of the two tugs upon the towing machine of the after tug in the observed conditions between Buoy No. 4 and Buoy No. 1 would have inevitably caused said cable to pull off the towing machine of the after tug; that though well knowing that the said log raft would be doomed to destruction in the event that they continued on their voyage from Buoy No. 4 to Buoy No.

1, a distance of over [48] two miles, they did so continue; that the petitioner was grossly negligent in the management of the said tugs and in the equipment and arrangement thereof and in the choice of a route down the said river and across the said bar on the voyage prior to the wrecking and loss of said raft more fully and particularly described in the claim on file herein; that prior to and after the separation of said tugs from said log raft, petitioner had ample time and opportunity to secure said raft and tow the same safely to San Francisco, but carelessly and negligently refused to do so, and did not so do and abandoned the same, and the same became a loss as aforesaid, although abundant additional towing power and assistance could have been procured from other tugs and vessels in said vicinity to furnish the necessary power to save the said raft and tow it across the said bar and perform the said contract, but that petitioner did neglect to procure for itself the said assistance, as more particularly alleged in the claim on file herein.

IV.

Denies that during all or any of the aforesaid times of towage of the aforesaid raft, said tugs were staunch, able and seaworthy vessels for the towage of said log raft, or that they were at such times fully or properly manned, equipped, officered, supplied and appareled, or any of them, or were well and sufficiently or sufficiently fitted and supplied, or supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and stores, or any of them, and that, or that,

all the same, or any of the same, were in good order and sufficient, or either of them, for the business and voyage, or either of them, on which they were then engaged or employed; that as to the presence of an officer of petitioner on said tugs, or [49] either of them, and as to the entrusting of the said tugs, and as to the experience of the navigators thereof, claimant is ignorant, wherefore it calls for proof of the same, if the same be pertinent; denies that they were competent at all and in all respects, or in any respect qualified for the work so entrusted to them.

V.

Answering Article V, claimant denies that the damages and injuries done, occasioned and incurred upon the said voyages of the said tugs were done, occasioned and incurred, or any of them, without the consent or design or neglect of petitioner, and as to the allegation that said damages and injury were without that privity or knowledge of petitioner, alleges that it is ignorant of the same, wherefore it calls for proof thereof, if the same be pertinent.

VI.

Answering Article VIII of said petition, claimant alleges that the order approving the report of the Honorable James P. Brown, United States Commissioner, appraising the value of the said two tugs, etc., is not fully or completely described therein (and refers to the matters set forth in Article I of this answer), in this, that the said order, entered the said 29th day of March, 1912, did contain the following clause:

“And be it further ordered that the said petitioner

file with this Court undertakings, with good and sufficient surety, in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, respectively conditioned for the payment into this court by said petitioner of the value of said tug 'Dauntless' and the value of said tug 'Hercules' as fixed by the report of the appraisers, heretofore filed and approved herein, [50] whenever the same may be ordered by this court.

Entered this 29th day of March, 1912.

E. S. FARRINGTON,

Judge."

That thereafter there was filed in the said limitation proceeding in the Northern District of California, stipulations required by said order, providing therein interest on the respective values of the said tugs at legal rate, from the 9th day of September, 1911; that the said legal rate is seven (7) per cent per annum, and that petitioner did obtain, and the said Court did make its orders approving the stipulations of petitioner, so containing the said provision for interest from September 9, 1911; that thereafter the said District Court did issue its order that upon filing the said stipulations so containing said interest, process should be issued in the said proceeding to limit liability; and that thereafter process was issued and served upon any and all claimants against said fund; that thereafter, due time having elapsed after the serving of said process, all of the claimants, if any there were other than Hammond Lumber Company, were found in default and an order enter-

ing their default was by the said court duly given and made, and that the said limitation proceeding, with the said other claimants so defaulted, was pending at the time of the filing of the petition in the proceeding in this United States District Court for the District of Oregon.

VII.

Answering Article IX of said petition, claimant denies that the said second amended complaint filed by Hammond Lumber Company contained allegations on its behalf to the effect that, measured by the market price of piling and spars in the city of San Francisco, in the month of September, 1911, the said raft and [51] its paraphernalia were worth a sum in excess of One Hundred and Ten Thousand, Nine Hundred and Eighty-three and 13/100 Dollars (\$110,983.13), for which judgment was demanded, and in that behalf alleges that it was in said second amended complaint, in said Circuit Court of Clatsop County, alleged as follows:

“That said raft when completed on said date and at the time it became a total loss as hereinafter stated, contained 592,499 lineal feet of piling and spars, and the piling and spars in said raft were of the reasonable value of \$98,969.50. That said raft as completed, including the piling and spars and chains, wire cables, shackles, turn buckles, and equipment, was at said time of the full and reasonable value of \$112,968.50. * * *

“This plaintiff therefore avers that by reason of the failure of the defendant to perform its said contract to safely tow said raft from the port of Astoria

in Oregon, to the port of San Francisco, in the State of California, and the loss of said raft in the manner as aforesaid, this plaintiff became and was damaged in the full sum of \$112,969.50, no part of which has been paid, excepting defendant is entitled to a credit of \$1985.37, proceeds received from portions saved.

“Wherefore, by reason of the premises, plaintiff demands judgment against the defendant for the sum of \$110.983.13, together with the costs and disbursements of this action.”

That nowhere in said suit in said Circuit Court of Clatsop County was any claim for interest made, other than in the statement in the brief quoted in Article IX of the petition, nor any amendment of the pleadings therein to support the suggestion of the said brief; admits that if said suggestion had been adopted and an amendment filed to permit its adoption, the claim of Hammond Lumber Company [52] would have been in excess of \$140,000.00, but that the said claim would have been less than the fund of One Hundred and Fifteen Thousand Dollars (\$115,000) plus interest at seven (7) per cent per annum (or six per cent per annum) from September 9, 1911, as provided for by petitioner in its stipulations in the said proceeding in the United States District Court for the Northern District of California.

VIII.

Answering Article X of said petition, claimant admits that the sum of One Hundred and Forty Thousand Dollars (\$140,000), thus made up of interest from the time of the disaster in question would exceed the value of the interest of petitioner in its

said tugs as the same existed at the close of their respective voyages upon which the said raft was lost, if computed without interest; but the amount of the said claim as existing at the time of the disaster at all times was less and has never been claimed to be larger than the value of the interest of petitioner in the said tugs at said time.

IX.

Answering Article XI of said petition, claimant avers that said offer of stipulation is insufficient in this, that it does not offer a stipulation conditioned for the payment into court of the value of the tugs "Dauntless" and "Hercules," plus interest from September 9, 1911, the date of the disaster.

X.

Answering Article XII of said petition, claimant denies that the injury, loss and damage therein set forth was not caused, occasioned and incurred by any act or default of petitioner, and in that behalf avers that it was due to the acts and default of petitioner as hereinabove set forth and more fully set forth in the claim on file herein; [53]

Answering the next thirteen lines of said petition, claimant repeats the defenses hereinbefore set forth; that the period of time at which said raft was taken over was not the proper period of time to bring said raft into said swells, in this, that the heavy ebb tide increased the force of the said swells and decreased the likelihood of the turning out of the same in the event that conditions at the bar should not warrant the completion of the passage thereof; denies that the said swells and seas could not have been foreseen

and were not, or were not foreseen by the officers or crew, or either of them, of said tugs; alleges that it is ignorant as to the investigation and advice as to weather conditions prior to the beginning of said towage, wherefore it calls for proof of the same, if the same be pertinent; that said weather conditions were not unusual on said bar at said season of the year; that if the incoming seas and swells made it impossible to control the navigation of the raft, this was a matter of which petitioner had knowledge; denies that the conditions aforesaid were those which could not have been foreseen and which petitioner could not protect against; denies that notwithstanding said conditions, petitioner's tugs put forth every effort to save the said raft, and that notwithstanding all the efforts of said tugs, and notwithstanding the efficient and careful navigation of the tugs, the raft was gradually turned and carried broadside against the sea and swells until the after end of said raft tailed off toward the breakers on Peacock Spit; denies that said tugs continued to put forth efficient efforts to pull upon said raft until after the raft had passed the black buoy; denies that suddenly and without warning the raft pulled the towing hawser off the towing machine on said "Dauntless," and in that behalf alleges that there was abundant warning that such was likely to occur; denies that said tugs "Dauntless" and "Hercules" were [54] fully equipped with large and powerful towing machines; denies that they were in every respect seaworthy in hull and machinery, and that, or that, said towing machines were in every part in

a thorough efficient state; denies that said tugs were manned with a full complement of experienced officers and crew and were, or were commanded by competent masters of long experience in towing rafts, and who were, or who were, in every respect familiar with the conditions of the Columbia river and bar, and the channels thereof, and the condition of weather, sea, tides and currents reasonably to be apprehended in towing said raft to sea; denies that the hawser with which said tug "Dauntless" was made fast to said raft was made of steel and was in every respect properly fastened to said towing machine, or at all, at the time said raft broke away from said tug; denies that said raft was large and unwieldy and that by reason of its size and construction was unmanageable in the seaway, with the result that when caught by the ebbing tide and currents and heavy seas, said tugs, despite their size and power, were unable to keep said raft within the channel and from drifting to the northerly side thereof and upon Peacock Spit, and alleges that if such was the fact, it was well known to petitioner at all times; denies that owing to the size and character of said raft it was impossible for said tugs to turn said raft around and return with it back up the river against the ebbing tide, and alleges that, even if such were the case, it was the duty of the tugs to obtain assistance for that purpose; that said assistance was available to the tugs at said time; denies that said Hammond Lumber Company well knew that the season was growing late to make a tow of such a character and well knew the dangers of the

seas then likely to be encountered at the entrance of said river, and denies that notwithstanding the knowledge so possessed, or at all, said Hammond Lumber Company assumed the risk [55] and consented, or consented that the rafts should be towed, on the 9th day of September, 1911, by the said tugs "Dauntless" and "Hercules," notwithstanding the dangerous navigation incident to said voyage.

XI.

Answering Article XIII of said petition, claimant denies that the loss of said raft was in no respect due to any unseaworthiness or any inefficiency on the part of said tugs, their machinery or equipment, or to any unskillfulness or negligence on the part of the masters, officers, or crews of said tugs, or any errors in navigation thereof, and in that behalf alleges that the loss of said rafts was due to unseaworthiness and inefficiency on the part of said tugs, their machinery and equipment, and to unskillfulness and negligence on the part of the masters, officers, and crew of said tugs and to errors in navigation thereof; denies that the loss was entirely due, or at all due, to perils of the sea or to the inherent risks and dangers of the enterprise or to the unwieldy character of said raft, or to the manner in which said raft was constructed, or to the size, weight and length of any of them, of the towing chains, or the manner in which they were made up and fastened to said raft by said Hammond Lumber Company.

XII.

Answering Article XIV of said petition, claimant

denies that all and singular the premises are true, save as hereinabove admitted, and denies that the same are within the maritime jurisdiction of this Honorable Court. [56]

WHEREFORE, your claimant prays that the petition herein be dismissed, and that claimant be hence dismissed with its costs.

WILLIAM DENMAN,
W. S. BURNETT,

Proctors for Hammond Lumber Company.

State of California,

City and County of San Francisco,—ss.

I, W. S. Burnett, being duly sworn, depose and say that I am the vice-president of the Hammond Lumber Company and as such officer I am authorized to make this verification in its behalf; that the allegations contained in the foregoing answer to petition and affidavit for dismissal of proceeding to limit liability are true, as I verily believe.

W. S. BURNETT.

Subscribed and sworn to before me this 30th day of October, 1916.

[Seal]

WM. D. PAGE,
Notary Public in and for the City and County of San Francisco, State of California.

Filed November 1, 1916. G. H. Marsh, Clerk.
[57]

And afterwards, to wit, on the 20th day of July, 1917, there was duly filed in said court, a Motion to Dissolve Injunction or to Dismiss Petition, in words and figures as follows, to wit:
[58]

*In the District Court of the United States for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Motion of Hammond Lumber Company, Sole Claimant, for Dissolution of Injunction Heretofore Issued Herein Against It and the Circuit Court of Clatsop County, State of Oregon, or, in the Alternative, for Dismissal of Petition for Limitation Herein as to Said Hammond Lumber Company, or In Toto.

To the Petitioner, and Its Counsel, Ira A. Campbell, Esq., Wallace McCamant, Esq., E. B. Tongue, Esq., and Messrs. Snow, McCamant & Bronaugh:

You and each of you will please take notice that on Monday, the 23d day of July, 1917, at the courtroom of said Court in the Federal Building, Portland, Oregon, upon the opening of Court on said day, or as soon thereafter as counsel may be heard, Ham-

mond Lumber Company, sole claimant herein, will move the said Court for the dissolution of injunction heretofore issued herein against it and the Circuit Court of Clatsop County, State of Oregon, or, in the alternative, for dismissal of petition for limitation herein as to said Hammond Lumber Company, or *in toto*, upon the following grounds, to wit:

I.

That the record herein shows that there is but one claimant herein, Hammond Lumber Company, a corporation, and that the time [59] for the filing of claims herein has long since elapsed and that the petition herein sets forth but one claim for loss, damage or injury, arising from the acts described in said petition, to wit, that certain suit filed by Hammond Lumber Company and tried in the Circuit Court for Clatsop County, State of Oregon, for the recovery of damages for the loss of the log raft described in said petition and does not suggest the possibility of any other claim, and that said suit is a suit to recover the sum of \$110,983.13, and that Hammond Lumber Company has never at any time claimed or demanded any sum in excess thereof.

II.

That the petitioner herein has enjoined the prosecution of said suit in Clatsop County and that claimant, Hammond Lumber Company, has filed herein its claim for the said sum of \$110,983.13.

III.

That it has been adjudicated between petitioner and Hammond Lumber Company and is a matter of

res adjudicata between petitioner and Hammond Lumber Company, by virtue of a decree of the Circuit Court of Appeals for the Ninth Circuit in the proceeding entitled "Shipowners & Merchants Tugboat Company vs. Hammond Lumber Company," Numbered 2388 in the records of said Court, and reported in 218 Federal Reporter, pages 161, 165, and it is the law that both the tugs "Dauntless" and "Hercules," referred to in said petition must be surrendered as a condition precedent to entitle petitioner to maintain any proceeding to limit its liability under the Revised Statutes of the United States in that behalf enacted, and that upon an *ex parte* appraisal of said tugs, without notice to Hammond Lumber Company, or knowledge on its part, and without opportunity to participate therein, said tugs have been appraised herein for an amount greatly in excess of the claim of Hammond Lumber Company, [60] to wit: in the sum of \$115,000.00; that by reason of the fact that there is but one claim on file herein and the time for the filing of other claims has expired, and if any such there be they are in default, and that said claim on file herein is for a less amount than the stipulation for the value of said tugs as so appraised, and their freight pending, this Court should make such order or decree herein as will permit the said Circuit Court of Clatsop County to proceed to a final adjudication of the said suit pending therein.

IV.

Said motion will be made upon the further ground that no claim has been filed herein other than the

said claim of Hammond Lumber Company and that the time within which any such other claim might or could be filed has long since elapsed, and it appears that the claim of Hammond Lumber Company as of the time of the loss of the said log raft in said petition pleaded was less than the value of said two tugs at said time.

V.

Said motion will be made upon the further ground that it appears that at the time of the institution of this proceeding there was then pending a proceeding for limitation of liability in the U. S. District Court for the Northern District of California, involving the loss of the same log raft which the Court last mentioned, with its equity powers, could have considered and to which Court petitioner could have and should have presented the alleged new facts as to the character of the claimant's claim.

VI.

Said motion will be made upon the further ground that in said limitation proceeding pending in the United States District Court [61] for the Northern District of California and by virtue of the decree therein affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, it was a matter of *res adjudicata* between petitioner and Hammond Lumber Company that the fund in limitation constituted and was the sum of \$115,000.00, with legal interest accruing thereon from the 9th day of September, 1911.

VII.

Said motion will be made upon the further ground

that while Hammond Lumber Company insists that it has never at any time in said suit in Clatsop County, in its said brief filed therein, or otherwise, demanded or claimed, or intended to demand or claim, the recovery of any sum in excess of \$110,983.13, nevertheless, that said brief, copy of which, so far as it relates to said matter is attached as Exhibit "E" to the affidavit of A. B. Hammond, L. C. Stewart, H. F. Faull, E. A. Hinch and W. S. Burnett, attached hereto, marked Exhibit 1 and made a part hereof, can be regarded at most as ambiguous or uncertain as to whether it imports a demand in excess of said sum last mentioned, and that Hammond Lumber Company does hereby, for the purpose of clearing up such, if any, ambiguity or uncertainty, declare the total amount of its said claim against Shipowners & Merchants Tugboat Company to be and is limited to the said amount of \$110,983.13 and no more, and that said sum is and ever has been the total amount of its claim against petitioner by virtue of the matters and things complained of in the said second amended complaint filed in said suit in Clatsop County, and by virtue of its claim filed herein, and that it has never made any claim by virtue of such matters in any sum in excess thereof, and that nothing contained in any pleading or brief filed by Hammond Lumber Company in said suit in Clatsop County, or elsewhere, can be construed, or was intended to be construed, to make a claim in excess of the above sum last mentioned. [62]

VIII.

Said motion will be made upon the further ground,

that at the suggestion of petitioner herein, Hammond Lumber Company and petitioner stipulated in open Court, in the said action in the said Circuit Court of Clatsop County that the trial of said action before a jury should be waived and that such trial should be before and by the Court without the intervention of a jury and that in pursuance of such stipulation and waiver so made it was ordered by said Court that the cause should be tried and said cause was in fact tried by the Court without the intervention of a jury and that by reason of the premises said petitioner has voluntarily submitted itself in relation to the matters arising or to arise in said action to said Circuit Court for decision and adjudication and has waived its right, if any it otherwise had, to require said Hammond Lumber Company to litigate its said claim in this or any other proceeding than the said action in Clatsop County.

IX.

That in making said motion Hammond Lumber Company will rely upon all pleadings, papers, documents, entries and filings in the record of this proceeding to limit liability and upon the opinion and decree of the Circuit Court of Appeals for the Ninth Circuit, rendered and made in the said cause, entitled "Shipowners & Merchants Tugboat Company vs. Hammond Lumber Company," numbered 2388 in the docket of said Court and reported in 218 Federal Reporter, p. 161 et seq., and upon the affidavit of A. B. Hammond, L. C. Stewart, H. F. Faull, E. A. Hinch and W. S. Burnett, attached hereto and made a part hereof, and marked Exhibit 1.

WHEREFORE, said Hammond Lumber Company moves for dissolution of injunction heretofore issued herein against it and the Circuit [63] Court of Clatsop County, State of Oregon, or, in the alternative, for dismissal of petition for limitation herein as to said Hammond Lumber Company, or *in toto*, and that it recover its costs against petitioner, and for such other or further relief as may be meet and agreeable to equity.

W. S. BURNETT,

G. C. FULTON,

Proctors for Claimant, Hammond Lumber Company.

[64]

Exhibit No. 1—Affidavit of A. B. Hammond et al.

EXHIBIT 1.

*In the District Court of the United States, for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIPOWNERS &
MERCHANTS TUGBOAT COMPANY,
Owners of the Steam Tugs "DAUNTLESS"
and "HERCULES," for Limitation of Li-
ability.

AFFIDAVIT OF A. B. HAMMOND, L. C. STEW-
ART, H. F. FAULL, W. S. BURNETT AND
E. A. HINCH, TO BE USED ON MOTION
FOR DISSOLUTION OF INJUNCTION
HERETOFORE ISSUED HEREIN AGAINST
IT AND THE CIRCUIT COURT OF CLAT-
SOP COUNTY, STATE OF OREGON, OR, IN

THE ALTERNATIVE, FOR DISMISSAL OF
PETITION FOR LIMITATION HEREIN AS
TO SAID HAMMOND LUMBER COMPANY,
OR IN TOTO.

State of California,

City and County of San Francisco,—ss.

A. B. Hammond, L. C. Stewart, H. F. Faull, W. S. Burnett and E. A. Hinch, being first duly and severally sworn, depose and say: That Hammond Lumber Company, claimant herein, was incorporated under the General Incorporation Act of the State of New Jersey, entitled “An Act Concerning Corporations (Revision of 1896),” Chapter 185, Laws of 1896, and acts amendatory thereof; and that upon proceedings duly taken in pursuance of said act, said corporation became and was dissolved on the 15th day of June, 1917; that at the time of such dissolution, in pursuance of said act and under the Articles of Incorporation of said company and its by-laws, the board of directors, of said Hammond Lumber Company consisted of five members and affiants constituted and were at said time the directors thereof; that [65] as such directors at the time of said dissolution under the said act then and now in force and in that behalf provided, affiants thereupon became, were and still are the trustees in dissolution of said corporation, and that under and in pursuance of said act the corporate existence of said Hammond Lumber Company has been and is continued for the purpose of conducting litigation both for and against it, either in the name of said corporation, or in the name of said trustees, and for the purpose of wind-

ing up its affairs, and disposing of its property, and that affiants, as such trustees in dissolution are the sole agents and representatives of said corporation for any and all such purposes, and are authorized to make this affidavit on behalf of said corporation to be used upon this motion.

I.

That in the proceeding for limitation of liability instituted in the United States District Court for the Northern District of California by Shipowners & Merchants Tugboat Company, referred to in the petition for like limitation now pending in the United States District Court for the District of Oregon, an Interlocutory Decree of Default was made and entered therein; that a copy of said Interlocutory Decree of Default is attached hereto, made a part hereof and marked Exhibit "A."

That a copy of the opinion of Hon. M. T. Dooling, Judge of the said United States District Court for the Northern District of California, and a copy of the order entered in pursuance thereof, dismissing the said proceeding in said Court as to said Hammond Lumber Company and otherwise retaining jurisdiction of said proceeding is attached hereto, marked respectively Exhibit "B" and "C," and each is made a part hereof. [66]

That said proceeding in said United States District Court for the Northern District of California remained pending and undetermined and no hearing was ever had or held as respects the defaulted defendants, or otherwise, and was pending at the time of the institution of the said proceeding in the

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United States District Court for the District of Oregon and continued to remain pending and within the jurisdiction of the said United States District Court for the Northern District of California until after the institution of said proceeding in said United States District Court for the District of Oregon, to wit, until August 2, 1916, at which time said proceeding was dismissed, or attempted to be dismissed by said Shipowners & Merchants Tugboat Company, and that a copy of the so-called dismissal and order made thereon is attached hereto, marked Exhibit "D," and made a part hereof.

II.

That the following is a true and complete statement concerning the filing of briefs in the said action pending in the Circuit Court of Clatsop County upon and after the submission of said cause, to wit: That upon the conclusion of the trial of said action and after oral argument had by each of the parties thereto, Shipowners & Merchants Tugboat Company sought and obtained leave of the Court to file a brief, which brief was thereafter filed, and thereafter Hammond Lumber Company filed a brief in reply, being the brief referred to in the petition for limitation of liability herein; that thereafter Shipowners & Merchants Tugboat Company sought and obtained from said Court leave to file yet another brief, which was in fact filed on or about July 19, 1916, and a copy thereof served upon the attorneys for Hammond Lumber Company; that said attorneys and said Hammond Lumber Company contemplated applying to said Court for leave to file a brief in

reply in accordance with the practice permitting the plaintiff to file the closing brief, but within three days after the service of the [67] brief last mentioned of Shipowners & Merchants Tugboat Company upon Hammond Lumber Company, to wit, on July 21, 1916, said petition for limitation herein was filed in said United States District Court for the District of Oregon, an *ex parte* appraisal of the said tugs "Dauntless" and "Hercules" was had, an undertaking filed and approved, and Hammond Lumber Company and the said Circuit Court of Clatsop County were enjoined by said United States District Court for the District of Oregon from further prosecuting said action in the said Circuit Court of Clatsop County, and that thereby said Hammond Lumber Company was deprived of the opportunity of clearing up and settling any ambiguity there might have been in its discussion of the measure of damages applicable in the case in its said brief referred to in the petition herein. That attached hereto, marked Exhibit "E" and made a part hereof, is a copy of the entire discussion under the caption "The Value of the Raft," contained in the said brief of Hammond Lumber Company upon the question of the measure of damages and the evidence adduced at the trial in support thereof and on the subject of interest, and which contains the context surrounding the isolated remark quoted therefrom in the petition for limitation of liability herein.

Further in this behalf affiants deny that Hammond Lumber Company has ever at any time in said action in Clatsop County, or in the said brief of Ham-

mond Lumber Company, or otherwise, or elsewhere, demanded or claimed, or intended to demand or claim, the recovery of any sum in excess of \$110,-983.13, and affiants do hereby affirm and declare that the total amount of the claim of Hammond Lumber Company against Shipowners & Merchants Tugboat Company to be and is hereby and has been limited to the said sum last mentioned and no other sum, by virtue of the matters and things complained of in the second amended complaint filed in said action in said Circuit Court of Clatsop County and by virtue of its claim filed herein and that it [68] has never made any claim by virtue of such matters in any sum in excess thereof and that nothing contained in any pleading or brief filed by Hammond Lumber Company in said action in said Circuit Court of Clatsop County, or elsewhere, can be construed, or was intended to be construed, to make a claim in excess of the said sum last mentioned.

III.

That upon the calling of said action in said Circuit Court of Clatsop County for trial and just prior to the actual commencement of the trial thereof, Shipowners & Merchants Tugboat Company requested of the said Hammond Lumber Company that said action should be tried by the Court, without the intervention of a jury, to which said request said Hammond Lumber Company acceded, and that thereupon Hammond Lumber Company and said Shipowners & Merchants Tugboat Company stipulated in open court, in the said action last mentioned, that the trial of said action before a jury be waived,

and that such trial should be before and by the Court, without the intervention of a jury, and that in pursuance of such stipulation and waiver so made, it was ordered by said Court that the cause should be tried and said cause was in fact tried by the said Court without the intervention of a jury; that the Hon. J. A. Eakin was, during all of said time, the Judge of said Court and the Judge who presided at the trial of said action, and he has continued ever since to be and still is the Judge thereof.

And further affiants saith not.

A. B. HAMMOND.

L. C. STEWART.

H. A. FAULL.

W. S. BURNETT.

E. A. HINCH.

[Corporate Seal of Hammond Lumber Company.]

Subscribed and sworn to before me this 17th day of July, 1917.

[Notarial Seal] KATHRYN E. STONE,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires March 1st, 1921. [69]

EXHIBIT "A."

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

INTERLOCUTORY DECREE OF DEFAULT.

It appearing to this Court that Shipowners & Merchants Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under order of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and,

It further appearing that the report of said commissioner was filed with this court on the 23d day of March, 1912, and thereafter approved by this Court on the 29th day of March, 1912; and,

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the petitioner herein will pay into this Court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the [70] aforesaid appraised value of the interest of said petitioner in said steam tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from

the 9th day of September, 1911; and,

It further appearing that thereafter on the 2d day of April, 1912, a monition issued under order and seal of this court, and that the marshal for the Northern District of California, as commanded by said monition, cited all corporations, person or persons, claiming damages for any loss, damage or injury occurring or arising upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Postoffice Building, on the corner of Seventh and Mission Streets, in the city of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition, as ordered by this Court, by posting copies of said monition in three public places in the city and county of San Francisco, State of California, and by serving a copy of said monition upon said Hammond Lumber Company, a corporation, at its office, No. 260 California Street, city of San Francisco, State of California; and, that further public notice of said monition was given pursuant to order of this Court by publishing in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), in the city and county of San Francisco, State of California, a copy of said [71] monition once a

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week until the return day fixed in said monition, to wit, the 10th day of July, 1912; and,

It further appearing that on the return day of said monition, to wit, on the 10th day of July, 1912, at the hour of 10 o'clock in the forenoon, the crier of this court made proclamation for all corporations, person or persons, claiming damages for any loss, damage, or injury occurring or arising upon the aforesaid voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly anyone claiming damages for the loss of a raft of piling upon said voyages, to come into court and make due proof of their said claims and answer the petition of the Shipowners & Merchants Tugboat Company, petitioner herein, for limitation of liability, under pain of being pronounced in contumacy and default and having said petition taken *pro confesso* against them; and,

It further appearing that no corporation, person or persons, other than the Hammond Lumber Company, appeared in response to said proclamation, and that thereupon, on motion of proctors for petitioner, an order was entered pronouncing in default all corporations, person or persons, save and except the said Hammond Lumber Company, who might have any claim for loss, damage or injury occurring or arising upon the aforesaid voyages of said steam tugs "Dauntless" and "Hercules"; and,

It further appearing from the report of James P. Brown, Esq., the United States Commissioner named in said monition, that no claims have been filed with

him as directed by said monition;

And the Court being fully advised in the premises;
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the default of all persons and corporations save and except [72] the Hammond Lumber Company, having any claims against the Shipowners & Merchants Tugboat Company, petitioner herein, or said steam tugs "Dauntless" or "Hercules," for any loss, damage or injury occurring or arising upon those certain voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on September 9, 1911, and particularly of all persons and corporations, save and except the Hammond Lumber Company claiming damages for the loss of a raft of piling upon said voyages, be, and the same is, hereby entered.

Dated at San Francisco, this 12th day of July, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [73]

EXHIBIT "B."

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

OPINION.

IRA A. CAMPBELL, McCUTCHEN, OLNEY & WILLARD, Proctors for Petitioner.

DENMAN & ARNOLD, Proctors for Claimant.

The undisputed facts appearing thus far in this proceeding to limit liability are, briefly stated, as follows:

In August, 1911, the Hammond Lumber Company (hereinafter designated claimant) and the Shipowners & Merchants Tugboat Company (hereinafter designated petitioner), entered into a contract wherein the latter agreed, in consideration of the sum of \$2,250.00, to tow for the former a large raft of piling and spars from Astoria to San Francisco. Pursuant to this contract, claimant delivered to petitioner in September, 1911, such raft at Flavel in the port of Astoria to be by petitioner towed to San Francisco. Petitioner for the purpose of towing said raft out of the Columbia River and across the bar thereof, made use of two of its tugs, the "Daunt-

less" and the "Hercules," in the following manner: The tug "Dauntless" was fastened to the raft with a long towing cable, one end of which was wound around the drum of the towing machinery on said "Dauntless" and the other end of which was fastened to the raft, and the tug "Hercules" was fastened to the tug "Dauntless" with a long towing [74] cable leading through the forward bitts of the "Dauntless" to the towing machine of the "Hercules." The two tugs thus in tandem started to sea with the raft, but whether because of the negligence of petitioner as alleged by claimant, or because of the perils of the sea, as claimed by petitioner, the line from the "Dauntless" to the raft parted and the raft became a total loss. Claimant in November, 1911, commenced an action against petitioner in the Circuit Court of the State of Oregon for Clatsop County for \$71,249.90, for the loss of said raft, alleging that such loss was due to the negligence of petitioner. This action is now, and was, before the filing of the stipulation hereinafter mentioned, at issue upon the amended complaint of claimant and petitioner's answer thereto. On February 27th, 1912, petitioner filed in this court its petition for limitation of liability, but praying that if such liability be found to exist it be limited to the value of the tug "Dauntless," yet also offering to deliver the tug "Hercules" in case it be found that this tug also is liable, and praying further that all claims arising against petitioner by reason of said voyage be heard and determined in this court; and that all other proceedings be stayed. Appraisement having been duly made of the two tugs

the value of the "Dauntless" was fixed at \$45,000.00, and of the "Hercules" at \$70,000, for which values a stipulation was filed by petitioner. No person other than claimant having made any claim herein, in due time, and on July 12th, 1912, an interlocutory decree of default against all persons other than claimant was duly entered. Claimant now moves the Court to dismiss the petition for limitation of liability as to it, and for leave to prosecute its action in the Oregon State Court, upon the grounds: 1. That there is only one claim made herein; and 2. That that claim is for much less [75] than the appraised value of the tugs "Dauntless" and "Hercules," and that for these reasons there is no occasion for limitation of liability, and no reason for depriving claimant of its common-law remedy of trial by jury. Petitioner resists the motion, insisting that as this court has rightly acquired jurisdiction of this proceeding and of claimant, it should retain it until the whole matter is disposed of, and insisting further that in no event can the tug "Hercules" be held liable; that as the value of the "Dauntless" is only \$45,000, while claimant seeks to recover \$71,249.90, petitioner's liability should be limited to said sum of \$45,000, and therefore this Court must retain and dispose of the whole question.

The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there

are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which the liability of the ship-owner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug "Hercules" is equally liable with the tug "Dauntless" for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

Both tugs being engaged in the same venture, at the time of the disaster, are equally liable, if there be liability at all, though the tug "Dauntless" was the only one attached directly to the raft.

The Columbia, 73 Fed. 237:

Thompson Towing Co. vs. McGregor, 207 Fed.

212. [76]

Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner's protection does not require that this Court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolution of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The Court, however, will retain jurisdiction of the proceedings for

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the protection of petitioner against any other possible claims.

January 10th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [77]

EXHIBIT "C."

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS TUGBOAT COMPANY,
a Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

DECREE.

The motion of the Hammond Lumber Company, a corporation, to dismiss the petition herein, in so far as it applies to the Hammond Lumber Company, coming on duly to be heard, and it appearing that the claim of the Hammond Lumber Company is the only claim on file in this proceeding; and it further appearing that after due notice published and reserved, as required by law, a default has been entered herein against all persons, if any there be, entitled to file a claim in this proceeding; and it further appearing that the size of the fund for the payment of the sole claim herein filed, to wit, that of the Hammond Lum-

ber Company, exceeds the claim of the Hammond Lumber Company,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing against said Hammond Lumber Company, by the said petition; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that said Hammond Lumber Company do have and recover its costs herein; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.

Dated, January 13th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 13, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [78]

EXHIBIT "D."

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

DISMISSAL OF PROCEEDINGS.

The petition heretofore filed herein, and the whole of said proceedings, is hereby dismissed, and the clerk of said court is hereby authorized and directed to enter said dismissal of record.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Petitioner.

IT IS HEREBY ORDERED that said petition and said proceedings be and the same is hereby dismissed.

Dated: San Francisco, August 2d, 1916.

WM. W. MORROW,

Judge. [79]

EXHIBIT "E."

THE VALUE OF THE RAFT.

There should be little difficulty in determining the value of this raft. In fact, there is no controversy in regard to the market price of the piling and spars in San Francisco. Mr. Hammond (page 592) testified that the market value of these piling and spars in San Francisco, on the day they should have arrived, was as follows:

All 12 inch piling, 14 cents per lineal foot;

All 16 inch piling, 16 cents per lineal foot;

All 17 and 18 inch piling, 18 cents per lineal foot;

All spars, 50 cents per lineal foot.

Witness Charles H. Hoover (page 489), testifies from actual memoranda of the piling which went into this raft, from actual scale made by him, the raft was made up as follows:

- 5% 12 inch piling.
- 25% 16 inch piling.
- 40% 17 inch piling.
- 30% 18 inch piling.

As we figure it, the average value of all piling would be .173 cents per foot. In order that our figures may be checked up, and if incorrect, may be corrected, we herewith submit the method adopted in arriving at this amount, namely:

| | |
|--|------|
| 5% 12 inch piling at 14 cents per foot, | |
| equals (p. 592)..... | 007¢ |
| 25% 16 inch piling at 16 cents per foot, | |
| equals | 04¢ |
| 40% 17 inch piling at 18 cents per foot, | |
| equals | |
| 30% 18 inch piling at 18 cents per foot, | |
| equals | 126¢ |

Total average value in San Francisco. .173¢ per foot.

Therefore, estimating the piling in the raft at .173¢ per foot, we have,

| | |
|---|--------------|
| 592,500 feet piling at .173¢ per foot.... | \$102,502.50 |
| 1,232 feet spars, at 50¢ per foot (pg. 592) | 616.00 |
| Value of chain, etc., equipment raft construction (Plff's. Ex. "L") | 14,170.19 |

(Pg. 496, 511 et seq. Pg. 232)

Value of raft in San Francisco, Cal.....\$117,288.69

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From this should be deducted the following:

| | | | |
|---------------------------------|-----------|----------|--|
| Cost of breaking raft (pg. 593) | \$1900.00 | | |
| Cost of towage (pg. 3) | 2250.00 | | |
| Amount salved (pg. 541) | 1985.47 | 6,135.47 | |

Total Loss to Plaintiff. \$111,153.22

[80]

To this should be added interest from September 9, 1911, at 6 % per annum.

A little difficulty may be met with in determining the value of the raft at Astoria, owing to the fact there was practically no general fixed market value there. It seemed that no one was engaged in the business of handling piling there. Persons desiring piling generally made purchase thereof up the Columbia river, as best he could. The prevailing price for piling, however, was clearly shown to have been seven cents (7¢) per foot. This is the price fixed by Mr. Ayres, page 571, Evidence. This is the price not made up into the raft.

For spars, not made into the raft, this witness fixed the price at 15¢ per foot, page 572.

It cost the plaintiff to construct this raft, without taking into consideration costs of machinery and plant, or amount of money invested, a sum equal to one cent per lineal foot (pg. 577). The actual cost of the piling in the raft to plaintiff was, piling seven cents, and spars fifteen to thirty cents per lineal foot (pg. 580), plus towage charge to Astoria, amount to \$450.00.

We have, therefore, the following as the value of this raft at the port of Astoria, to wit:

| | |
|--|-------------|
| 592,500 lineal feet of piling at 8¢ per foot.. | \$47,400.00 |
| 1,232 lineal feet of spars at 20¢ per foot.. | 246.40 |
| Towage charge to Astoria..... | 450.00 |
| Value of chains, etc..... | 14,170.19 |

Value of raft at port of Astoria, September

9, 1911\$62,266.59

From this should be deducted the value of piling salvaged, namely, \$1,985.47. This would leave the amount the plaintiff should recover on this theory of the law, the sum of \$60,279.04, with interest from September 9, 1911, at 6% per annum.

Filed July 20, 1917. G. H. Marsh, Clerk. [81]

And afterwards, to wit, on the 10th day of September, 1917, there was duly filed in said court an Opinion on Exceptions and Motion in words and figures as follows, to wit: [82]

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Opinion on Exceptions and Motion for Limitation of Liability.

Portland, Oregon, Monday, September 10, 1917.

Memorandum by R. S. BEAN, District Judge:

Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the Court over the subject matter and was not waived by a general appearance.

The exceptions and the motion will be allowed and the petition dismissed.

(1) I am disposed to believe that the petitioner's remedy, if any, was by an application to the District Court of the Northern District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation of liability proceedings therein pending. These proceedings had been instituted by the petitioner here and were still pending in that court at the time the petition was filed in this court. True the proceedings had been dismissed as to the Hammond Lumber Company on the ground that its claim, as then asserted, did not exceed the value of the tugs, but jurisdiction over the proceedings was retained, and it was, I think, within the power of that court to have caused the Hammond Lumber Company to be brought in if it subsequently [83] asserted a claim in excess of the fund, and that such was the petitioner's remedy, and not by the commencement of a new proceeding in this court.

(2) But however that may be, the claim as made by the Hammond Lumber Company in the State court does not exceed the fund. The amount of such claim is to be determined by the state of the pleadings and the amount claimed therein, and not by the estimates or assertions of counsel in an argument based on his construction of the testimony and the law, made in a brief filed after the case had been submitted. The action in the State court is to recover unliquidated damages and interest as such is not recoverable in this State on such a demand. (Sargent vs. American Bank & Trust Co., 80 Or. 16.)

Filed September 10, 1917. G. H. Marsh, Clerk.
[84]

And afterwards, to wit, on Thursday, the 20th day of September, 1917, the same being the 69th Judicial day of the regular July term of said Court; present, the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [85]

*In the District Court of the United States for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIPOWNERS
& MERCHANTS TUGBOAT COMPANY,
Owners of the Steam Tugs "DAUNTLESS"
and "HERCULES," for Limitation of Lia-
bility.

Decree of Dismissal of Petition.

The exceptions to the petition herein and motion to dismiss said petition coming on duly to be heard, the said exceptions being sustained and the said motion being granted,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said petition be, and the same is, hereby dismissed.

Dated, September 20th, 1917.

R. S. BEAN,
Judge.

IT IS ORDERED that the injunction issued in the above-entitled proceedings be continued in force for 10 days to enable petitioner to perfect its appeal.

Sep. 21st, 1917.

R. S. BEAN,
Judge.

Filed Sep. 20, 1917. G. H. Marsh, Clerk. [86]

And afterwards, to wit, on the 29th day of September, 1917, there was duly filed in said court a Notice of Appeal, in words and figures as follows, to wit: [87]

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Notice of Appeal.

To the Hammond Lumber Company, and to Messrs.
W. S. Burnett, William Denman and G. C. Ful-
ton, Its Proctors:

You and each of you will take notice that Ship-
owners and Merchants Tugboat Company, the pe-
titioner in the above-entitled proceeding, hereby
takes its appeal to the United States Circuit Court
of Appeals for the Ninth District from the decree
passed in the above-entitled court and cause Sep-
tember 20, 1917.

IRA A. CAMPBELL,
SNOW, BRONAUGH & THOMPSON,
Proctors for Petitioner.

Receipt of copy of the within notice of appeal is
admitted at San Francisco, California, this 25th day
of September, 1917.

W. S. BURNETT,
WILLIAM DENMAN,
Proctors for Hammond Lumber Company.
Filed Sep. 29, 1917. G. H. Marsh, Clerk. [88]

And afterwards, to wit, on the 19th day of October,
1917, there was duly filed in said court, an
Assignment of Errors, in words and figures as
follows, to wit: [89]

*In the District Court of the United States for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of SHIPOWNERS
& MERCHANTS TUGBOAT COMPANY,
a Corporation, Owners of the Steam Tugs
“DAUNTLESS” and “HERCULES,” for
Limitation of Liability.

Assignment of Errors.

Now comes Shipowners and Merchants Tugboat Company, a corporation, petitioner and appellant herein, and says that in the record, opinion, decision and final decree in said cause there is manifest and material error, and appellant now makes and presents the following assignment of errors upon which it relies:

I.

The District Court erred in sustaining the exceptions of Hammond Lumber Company to the libel and petition of the Shipowners and Merchants Tugboat Company.

II.

The District Court erred in granting the motion of Hammond Lumber Company for the dismissal of said libel and petition of the Shipowners and Merchants Tugboat Company.

III.

The District Court erred in rendering the decree herein, of date the 20th day of September, 1917, dismissing the libel and petition of said Shipowners

and Merchants' Tugboat Company on file in said District Court. [90]

IV.

The District Court erred in holding and deciding that the remedy of appellant and petitioner, Shipowners and Merchants Tugboat Company, was by an application to the Southern Division of the United States District Court for the Northern District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation proceedings previously instituted therein by said Shipowners and Merchants Tugboat Company.

V.

The District Court erred in holding and deciding that the limitation proceedings instituted by the Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California were pending in said last-named court at the time said Shipowners and Merchants Tugboat Company filed its said libel and petition to limit liability, if any, in the District Court of the United States for the District of Oregon.

VI.

The District Court erred in holding and deciding that the limitation proceedings instituted by the Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California were pending as to Hammond Lumber Company in said last-named court at the time said Shipowners and Merchants

Tugboat Company filed its said libel and petition to limit liability, if any, in the District Court of the United States for the District of Oregon. [91]

VII.

The District Court erred in holding and deciding that it was within the power of the District Court of the United States for the Northern District of California for the Southern Division to have caused the Hammond Lumber Company to be again brought into the said limitation proceedings previously instituted by said Shipowners and Merchants Tugboat Company in the District Court of the United States for the Northern District of California, after said Hammond Lumber Company had been dismissed from said proceedings and said judgment and decree dismissing said Hammond Lumber Company from said proceedings had become a final judgment.

VIII.

The District Court erred in holding and deciding that the claim as made by the Hammond Lumber Company in the Circuit Court of Oregon in and for the county of Clatsop does not exceed the fund surrendered in the proceedings instituted by petitioner in the District Court of the United States for the District of Oregon to limit its liability, if any, for any loss or damage occasioned or incurred upon a certain voyage of the steam tugs "Dauntless" and "Hercules" in said proceedings referred to.

IX.

The District Court erred in holding and deciding that the amount of the claim made by said Hammond Lumber Company in the suit pending in the Circuit

Court of the State of Oregon, in and for the county of Clatsop is alone to be determined by the State of the pleadings and the amount claimed therein.

X.

The District Court erred in holding and deciding that the sum asked for by said Hammond Lumber Company in said suit in [92] the State court was an estimate or assertion of counsel, based on his construction of the testimony and the law applicable, and not a claim for a sum in excess of the appraised value of the tugs "Dauntless" and "Hercules."

XI.

The District Court erred in holding and deciding that the Hammond Lumber Company had not made a claim against the Shipowners and Merchants Tugboat Company in excess of the appraised value of the tugs "Dauntless" and "Hercules."

XII.

The District Court erred in not proceeding to trial upon the issues made by the petition, claim and answer of Hammond Lumber Company, to determine the liability of the petitioner for any act of the tugs "Dauntless" and "Hercules," and, if any liability was found to exist, in not then proceeding to determine the right of said petitioner to a limitation of liability therefor.

XIII.

The District Court erred in not holding and deciding that it had jurisdiction to proceed to a trial upon the issues raised by the petition, claim and answer of Hammond Lumber Company.

XIV.

The District Court erred in not overruling the exceptions of the Hammond Lumber Company to the petition of Shipowners and Merchants Tugboat Company and in not denying the motion of said Hammond Lumber Company to dismiss said petition. [93]

WHEREFORE, petitioner and appellant prays that the judgment and decree of the lower court be reversed.

IRA A. CAMPBELL,
E. B. TONGUE,
SNOW, BRONAUGH & THOMPSON,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Petitioner and Appellant.

Filed October 19, 1917. G. H. Marsh, Clerk.
[94]

And afterwards, to wit, on the 20th day of October, 1917, there was duly filed in said court, a Prae-cipe for Transcript, in words and figures as follows, to wit: [95]

*In the District Court of the United States, for the
District of Oregon.*

No. 7220.

In the Matter of the Petition of the SHIP-OWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Praeipce for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare apostles on appeal in the above-entitled cause and include therein the following from the record of said cause:

The petition to limit liability.

Restraining order entered July 21, 1916.

Exceptions of Hammond Lumber Company to the petition.

Claim of Hammond Lumber Company.

Answer of Hammond Lumber Company.

Motion to dissolve injunction, etc.

Opinion of the Court.

Final Decree.

Notice of Appeal, and Assignment of Errors.

IRA A. CAMPBELL,

SNOW, BRONAUGH & THOMPSON,

Proctors for Petitioner.

Filed October 20, 1917. G. H. Marsh, Clerk.

[96]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 96, inclusive, constitute the Apostles on Appeal in the cause in said court, In the Matter of the Petition of the Shipowners and Merchants Tugboat Com-

96 *Shipowners and Merchants Tugboat Company*

pany, a Corporation, Owners of the Steam Tugs "Dauntless" and "Hercules," Petitioners for Limitation of Liability, Appellant; The Hammond Lumber Company, a Corporation, Claimant and Appellee; that the said apostles contain the caption, and a full, true and correct transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the rules of court and the praecipe of the appellant.

And I further certify that the cost of the foregoing Apostles is \$28.10, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Portland in said District, this 23d day of October, 1917.

[Seal]

G. H. MARSH,
Clerk. [97]

[Endorsed]: No. 3070. United States Circuit Court of Appeals for the Ninth Circuit. Shipowners and Merchants Tugboat Company, a Corporation, Appellant, vs. The Hammond Lumber Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed October 25, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY
(a corporation), owner of the steam tugs
"Dauntless" and "Hercules",

Appellant,

VS.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

IRA A. CAMPBELL,

E. B. TONGUE,

SNOW, BRONAUGH & THOMPSON,

MCCUTCHEEN, OLNEY & WILLARD,

Proctors for Appellant.

FILED

1916 5 - 1916

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No. 3070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY
(a corporation), owner of the steam tugs
"Dauntless" and "Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

I.

STATEMENT OF THE CASE.

This matter comes before this court on an appeal from a decree of the District Court of Oregon, dismissing appellant's petition for a limitation of liability on appellee's motion to dismiss and exceptions to the petition.

The petition for limitation of liability showed that on the 9th day of September, 1911, a large raft of piling, belonging to appellee, broke loose from the tugs "Dauntless" and "Hercules", belonging to appellant.

while being towed out of the Columbia River on a voyage to San Francisco, and thereupon became practically a total loss on Peacock Spit at the entrance to said river.

Following said loss, and on November 9, 1911, appellee commenced an action against appellant in the Circuit Court of Clatsop County, State of Oregon, wherein it prayed judgment in the sum of \$71,249.90 as the value of said raft.

Thereafter, and on the 27th day of February, 1912, appellant filed in the United States District Court for the Northern District of California, its petition for a limitation of liability on account of all losses and damages to property done, occasioned or incurred upon the said voyages of said tugs, and particularly for the loss of said raft, and asked that such liability should not be allowed to exceed the value of petitioner's interest in said tug "Dauntless" and her freight if any pending, or if the court should find that liability existed on the part of said tug "Hercules", that such liability should in no event be allowed to exceed the value of petitioner's interest in both of said tugs and their freights, if any, pending at the close of their respective voyages upon which said raft was lost.

Upon the filing of said petition an order was entered referring the cause to the United States Commissioner for the purpose of making due appraisalment of the value of the interest of petitioner in said tugs as the same existed at the close of said voyages. Due notice thereof was given appellee, and a hearing for the pur-

pose of said appraisalment was held at which appellant and appellee produced evidence as to the value of said tugs. Said commissioner appraised the value of the interest of petitioner in said tug "Dauntless" at the sum of \$45,000, and the value of its interest in said tug "Hercules" at \$70,000. Due notice of the filing of said report was given appellee, and thereafter on March 29, 1912, said report was confirmed by said court, and the value of petitioner's interest in said tugs was fixed at the respective sums of \$45,000 and \$70,000, or a total of \$115,000.

Thereafter, and on July 30, 1912, appellee filed a claim in said limitation proceedings for the loss of said raft in the sum of \$71,249.90, with interest and costs, and on the same day also filed exceptions to the petition and prayed a dismissal of said petition upon the ground that the petition failed to show that the value of said tugs was less than the value of said raft. Argument was heard upon the exceptions, and, on January 10, 1914, the said District Court rendered its decision and entered a final decree dismissing said petition as against appellee upon the ground that if there was any liability at all, both of said tugs being engaged in the same venture, were equally liable, and inasmuch as the value of said tugs exceeded the demands of appellee for the loss of said raft, the proceedings should be dismissed.

Appellant thereupon appealed to this court from said decree, and, on November 17, 1914, this court rendered its decision wherein it pointed out, in its opening statement of facts, that the values of said

tugs "Dauntless" and "Hercules" were of the sums of \$45,000 and \$70,000, respectively, and that the amount of the claim of said Hammond Lumber Company for the value of said raft was the sum of \$71,249.90, and affirmed said decree upon the ground that as the value of said tugs exceeded the amount of the claim of appellee, and as it was inconceivable that any claim other than that of the owner of the raft could possibly arise, the proceedings should be dismissed.

Subsequently, and on the 18th day of November, 1915, the aforesaid cause then pending in the Circuit Court for Clatsop County was brought on for trial, and during the course of said trial appellee amended its complaint by leave of court and enlarged its claim against appellant for the value of said raft from the sum of \$71,249.90 to the sum of \$110,983.13.

After said cause was submitted to the court, leave was taken by appellee to file a brief with said court, and, thereafter, and on the 21st day of June, 1916, a brief was served upon appellant and filed with said court, wherein appellee alleged that its total loss in the destruction of said raft was the sum of \$111,153.22, and claimed in addition thereto interest on said sum from September 9, 1911, at six (6) per cent. per annum. The claim of appellee as thus set forth in said brief, viz.: \$111,153.22, with interest at six (6) per cent. per annum from September 9, 1911, was in excess of the sum of \$140,000, and was greatly in excess of the aforesaid value of appellant's interest in said tugs "Dauntless" and "Hercules" as the same

existed at the close of the respective voyages of said tugs on which said raft was lost, viz. in excess of the aforesaid sum of \$115,000.

Thereby, and for the first time, appellee preferred against appellant a claim in excess of the value of petitioner's interest in said tugs.

Following the making of said claim, and on the 21st day of July, 1916, appellant filed in the United States District Court for the District of Oregon its petition for a limitation of its liability, if any, for the loss of said raft, and, pursuant to an order entered by said court, filed its bond in the sum of \$115,000, being the value of petitioner's interest in said tugs "Dauntless" and "Hercules" as the same were at the close of the voyages of said tugs upon which said raft was lost.

Said petition denied all liability for the loss of said raft, but prayed that in case the liability was found to exist, it in no event should be permitted to exceed the value of appellant's interest in said tugs at the close of said voyages upon which said raft was lost.

Thereafter, and on October 30, 1916, pursuant to a monition which had in due course issued out of said cause, appellee filed an answer to said petition and a claim for the loss of said raft in the sum of \$110,983.13, and also filed exceptions to said petition upon the ground that said petition failed to disclose facts sufficient to warrant a limitation of liability in that (a) it showed the claim of claimant, without interest at the time of the loss of said log raft in said petition pleaded, was less than the value of said tugs at said

time; (b) it showed that there was then pending a proceeding for limitation of liability in the Northern District of California involving the loss of said log raft in which the court, with its equity powers, could have considered the alleged new facts as to the character of claimant's claim; and (c) it did not show that there were any other claims, a necessary prerequisite to the right to limit where the fund exceeds the one claim alleged, and that this was a matter *res adjudicata* between petitioner and claimant by virtue of a decree of the Circuit Court of Appeals in that proceeding entitled *Shipowners and Merchants Tugboat Company v. Hammond Lumber Company*, No. 2388 in said court, and reported in 218 Fed. Rep. 161 at 165.

Subsequently, and on July 20, 1917, appellee filed a motion for a dismissal of said petition for limitation of liability.

Said exceptions and motion were duly argued before said court on the 23rd day of July, 1917, and thereafter on September 10, 1917, said District Court rendered its decision sustaining said exceptions and motion and entered a decree dismissing said petition.

Thereafter, and on the 25th day of September, 1917, appellant prosecuted its appeal to this court. Errors have been duly assigned to said decision and decree of said District Court.

II.

SPECIFICATIONS OF ERRORS.

The errors assigned may be grouped for convenience under the following specifications:

1. The District Court erred in holding and deciding that the claim made by appellee in the Circuit Court of Clatsop County did not exceed the value of appellant's interest in its said tugs "Dauntless" and "Hercules" at the close of their respective voyages on which said raft was lost, and, for that reason, in dismissing the petition herein (Assignment of Errors VIII, XIV, X and XI).

2. The District Court erred in holding and deciding that the limitation of liability proceedings in the District Court for the Northern District of California were as against appellee still pending in that court at the time the petition for limitation of liability in the District Court for Oregon was filed, and in holding and deciding that appellee's remedy was by supplemental petition or otherwise to have appellee brought in and made a party to the limitation proceedings previously instituted by appellant in said District Court for the Northern District of California, and, for that reason, in dismissing the petition herein (Assignment of Errors IV, V, VI and VII).

3. The District Court erred in dismissing the petition herein and in not proceeding to trial upon the issues made by the said petition and appellee's claim and answer thereto (Assignment of Errors I, II, III, XII, XIII and XIV).

III.

ARGUMENT.

Appellee has made a claim in the Circuit Court of Clatsop County in excess of the value of appellant's interest in its tugs "Dauntless" and "Hercules" at the close of their respective voyages on which appellee's raft was lost. The District Court erred in dismissing the limitation proceedings.

As has been pointed out in the statement of facts, the value of appellant's interest in the said tugs "Dauntless" and "Hercules", as the same existed at the close of the voyages on which the said raft was lost, was appraised by the commissioner to whom the matter was referred by the United States District Court for the Northern District of California, and thereafter approved by said court, at the sums of \$45,000 and \$70,000, respectively, or at the total sum of \$115,000. As the value of appellant's interest in said tugs was squarely in issue in the aforesaid proceedings between appellant and appellee, as parties thereto, the appraisalment of the commissioner and court of such value thereby became *res adjudicata* as between the parties hereto.

The foregoing rule is elementary. Of it the Supreme Court, in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 47, said:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction. * * * cannot be disputed in a subsequent suit between the same parties or their privies."

Thereafter, during the trial of the action in the Circuit Court of Clatsop County, appellee's complaint was amended and its claim against appellant for the value of said raft was thereby increased from the sum of \$71,249.90 to \$110,983.13. Subsequently the parties to said action filed briefs, and in the brief filed by appellee its demand for damages against appellant was again increased from \$110,983.13 to \$111,153.22 and interest thereon at the rate of six per cent. per annum from September 9, 1911, the date of the loss. After having stated that the total loss to plaintiff (appellee) on the value of the raft in San Francisco was \$111,153.22, appellee made its claim in these words: "*To this should be added interest from September 9, 1911, at six per cent. per annum.*"

The amount which appellee thus claimed from said court for the loss of said raft exceeded the sum of \$140,000, for \$111,153.22, with interest at the rate of six per cent. per annum from September 9, 1911, to July 21, 1916, the date of the filing of the petition, would amount to \$143,609.96.

It cannot be said that the statement in the brief was not a request for an award by the court against appellant of a sum which, if decreed, would have exceeded \$140,000. It is idle, we submit, for appellee to contend that when it used the words of the brief that a demand was not being made upon the Clatsop County court for an award in excess of the value of appellant's interest in said tugs.

Its attempted explanation of its purpose in asserting the demand in its brief is too shallow. In a solemn

document in which it was urging the Circuit Court to award damages it now says that in stating that it "should" have interest—"to this should be added interest", to use its exact words—it only meant to say to the court that it "ought" to have interest, although it now claims that it was not a case in which under any circumstances it was entitled to interest. In other words, on its own explanation, appellee was stating to the court that it "ought" to have something which it knew that it was not entitled to and yet was gratuitously "enlightening" the court without any intent to ask for interest. The brief was not an academic treatise upon the theory of jurisprudence. It was a forceful effort to mulct appellant in damages, and when appellee employed the language it did, it made a plain demand for an amount in excess of \$140,000. No other rational explanation is tenable. The excuse now offered by appellee is worse than none and is illogical to the Nth degree.

It is immaterial that the complaint was not again amended to include the demand for interest, as it has been definitely held that the Oregon courts may allow interest in an action at law even though not prayed for in the complaint.

Rutenic v. Hamaker, 40 Ore. 444; 67 Pac. 192.

That decision cannot be distinguished upon the ground suggested by appellant for it squarely held that in a case where plaintiff is entitled to interest, prayer therefor in the complaint is not necessary. It may be true that under Oregon law, the case at bar

was not one in which interest could be allowed, but that fact is entirely beside the question. The point is that a demand for interest was being made, and *Rutenic v. Hamaker*, *supra*, is an authority for its allowance by the court if the demand was legally proper. The claim was made and thereby jurisdiction in the federal court was established. In the exercise of that jurisdiction, then and only then could the validity of the demand be inquired into.

Nor was the validity of the claim made by appellee open to question by the District Court at that stage of the proceedings in which it dismissed the petition herein. It is immaterial whether the claim as made was good or bad; whether it had any foundation in fact or in law, for it was sufficient to give the court jurisdiction in the limitation proceedings that a claim had been made in excess of the value of petitioner's interest in the tugs at the close of their respective voyages upon which the raft was lost.

For illustration, suppose that prior to the institution of the limitation proceedings had in the District Court for the Northern District of California, demand had been made upon the Shipowners and Merchants Tugboat Company by others than the Hammond Lumber Company for damages resulting to other vessels or fishing nets from the break-up of the raft,* and that such claims, together with that preferred by the Hammond Lumber Company, had been set forth in the petition for limitation of liability! Surely this court will not enunciate the new doctrine that the District

*As appellee now suggests contrary to its contention in this court on the former hearing (Brief p. 31; 218 Fed. 161 at 165).

Court would have had power to have inquired into the validity of such claim for the purpose of determining if it did not have jurisdiction to entertain the limitation of proceedings. Unless violation is to be done to all principles applicable to limitation proceedings and to logic, this court must hold that it is enough to create jurisdiction that claim has been made in excess of the value of petitioner's interest in said tugs. The District Court for Oregon had no more authority to inquire into the validity of the claim which was made by appellee in its brief in the Circuit Court than the District Court for the Northern District of California would have had in the case stated. It seems undeniable that if the District Court for Oregon had power to inquire into the validity of the claim made upon the Circuit Court, then that that power must extend to an inquiry upon any ground upon which a claim may be without merit.

The District Court would have just as much power to pass upon the merit of the claim as fact of negligence as matter of law, for if it had power to make inquiry at all at that stage of the proceedings, there could be no limitation of its power. Any other position we submit is illogical. And yet this leads us to the absurdity of saying that the District Court has jurisdiction in the limitation proceedings for the purpose of passing upon the merits of a claim in order that it might be determined whether or not it has jurisdiction to entertain the proceedings at all. The error of such position is too manifest for words.

This being true, it is immaterial for the purpose of vesting jurisdiction in the District Court to entertain the limitation proceedings, whether interest was allowable upon the value of the raft. The District Court simply exceeded its authority in inquiring into that question.

This court will not deny that if the demand of the brief were allowed by the Circuit Court, whether rightfully so or not, it would have entered a decree in appellee's favor in excess of \$140,000. And adjudged by the very principles which induced this court to sustain the District Court for the Northern District of California in the former limitation proceedings,* the District Court for Oregon should have held that it had jurisdiction to entertain the proceedings as a claim had been made in excess of the value of petitioner's interest in the two tugs. The moment that that claim was asserted, appellant had the right to invoke the jurisdiction of the District Court under the statute and the admiralty rules of the Supreme Court of the United States.

On the principles forming the basis of this court's decision in the former limitation proceedings,* and upon which the District Court for the Northern District of California dismissed said proceedings, appellant for the first time had the right to invoke the jurisdiction of a federal court in a limitation proceeding when the aforesaid claim was made by appellee in its brief. Up to that moment a claim had never been made either

*218 Fed. 161.

*218 Fed. 161.

verbally, by document, or before a court, in an amount in excess of the value of petitioner's interest in its said tugs at the close of their respective voyages on which said raft was lost. Appellant, therefore, was never before in position to invoke rightfully the jurisdiction of a federal court until it received the brief in which the demand was made, and thereupon with due promptness, it obtained jurisdiction by filing its petition.

The fact that appellee waited for five years before it increased its claim to an amount in excess of the value of petitioner's interest in the tugs, constitutes no reason for denying appellant the benefit of the jurisdiction of the federal courts.

Upon the making of the claim, the right to invoke jurisdiction attached and upon the institution of the limitation proceedings the first question which the District Court would have been called upon to decide on the trial would have been whether appellant was liable at all for the loss of the raft, and, secondly, if liable whether it had a right to a limitation of its liability.

Prov. & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578.

Manifestly, there was no more power on the part of the District Court at that stage of the proceedings to pass upon the validity of appellee's claim for interest for the purpose of determining appellant's right to jurisdiction than there was to pass upon the merits

of the claim of negligence in the loss of the raft. If it could pass upon one such claim, it could pass upon any number, and thus a principle would be enunciated whereby the right of a shipowner to invoke the jurisdiction of the federal courts in limitation proceedings, where a number of claims had been preferred in excess of the value of his interest in his vessel, would be determined by the court inquiring into the validity of each of the several claims, and by finally coming to the conclusion that there was but one valid claim of less than the amount of the value of the vessel, deny its jurisdiction.

We submit that the petition herein shows that appellee has made a claim against petitioner in excess of the value of its interest in the vessels alleged to be in fault, and that thereby and thereupon appellant became vested with the right to invoke the jurisdiction of the federal courts.

White v. Island Trans. Co., 233 U. S. 346;

The Tug No. 16, 237 Fed. 405;

Shipowners and Merchants Tugboat Company v.

The Hammond Lumber Company, 218 Fed. 161.

The District Court erred in dismissing the proceedings.

**Appellee cannot defeat the District Court's jurisdiction by
reducing claim.**

Appellee having made a claim in excess of the appraised value of appellant's interest in said tugs "Dauntless" and "Hercules," and appellant having thereupon invoked the jurisdiction of the District Court

in a proceeding to limit its liability, the court cannot be ousted of such jurisdiction by appellee reducing its claim to an amount less than the value of appellant's interest in said tugs. This was settled by

The John K. Gilkinson, 150 Fed. 454, 457,

wherein the court said:

"But in any event, when a court once acquires jurisdiction in a matter of this kind, it cannot be divested of it by any act on the part of the plaintiff in attempting to reduce his claim."

The Tolchester, 42 Fed. 180.

The offer of appellee to reduce its claim becomes, therefore, ineffectual, but is significant in that the offer in itself is an admission of the existence of the claim.

The claim made by appellee exceeds the fund created by the bond for the value of appellant's interest in said tugs given in lieu of their surrender, and jurisdiction attached on filing of the petition.

Sec. 4 of the limited liability act of March 3, 1851, provides:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."
(Sec. 4283, U. S. Rev. St.)

The procedure by which the act was given operative effect was prescribed by Rules 54 to 58 of the Admir-

alty Rules of the United States Supreme Court. Rule 54 provides:

“When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled ‘An act to limit the liability of shipowners and for other purposes,’ now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; *and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for the payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further*

notice reserved through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims."

Upon filing its petition for limitation of liability in the United States District Court for Oregon, appellant elected not to surrender its tugs to said court (as it was not physically possible owing to their absence at sea), but to give a stipulation with sureties for the value of the interest of appellant in said tugs and their freight pending for the voyage on which said raft was lost, as authorized by the provisions of Rule 54. As the value of appellant's interest in said tugs at \$115,000 had become *res adjudicata* between appellant and appellee in the limitation proceeding previously had in the District Court for the Northern District of California, the District Court for Oregon* by an order duly entered fixed the amount of the stipulation to be given by appellant for the value of its interest in said tugs "Dauntless" and "Hercules", at \$115,000, which bond, with qualified surety, was filed with said court. The bond provided for the payment of interest on said \$115,000 from its date and not from the date of the loss of said raft. Unless the court was in error in not requiring said bond to carry interest from the date of the loss of said raft, it is manifest that the fund out of which appellant's claim, as preferred before said Circuit Court for Clatsop County, if established

*The District Judge was fully informed as to the details of the California proceedings. There was no concealment as intimated by appellee who was not present at the ex parte hearing.

against appellant, would be allowed, was less than the fund. On the other hand, if the bond should have carried interest from the date of the loss of the raft, and not from the date it was given, clearly the fund would have exceeded the claim as made, and thus, under the rule of this court in the former proceeding,* jurisdiction would not have attached. It has become a settled rule of law by the great weight of authority that the bond given for an owner's interest in his vessel in lieu of a surrender of the vessel, as authorized by Rule 54, shall not bear interest, save from its date.

In an early case the question was passed upon and the shipowner was compelled to pay interest on the claims from the date of the stipulation.

The Favorite, 12 Fed. 213.

That case was followed by

In re Harris, 57 Fed. 243.

in which the Circuit Court of Appeals for the Second Circuit affirmed a decree of the District Court requiring the owner of a tug to file a bond, with sureties, stipulating for interest from the date of the bond. The petitioner protested against being required to stipulate for interest, and thus the question was squarely presented to the courts, and of which Circuit Judge LaCombe said:

“Appellants contend that the District Court erred in requiring a stipulation for interest from the date of the bond upon the appraised value of ship and freight, and insist that in proceedings under the act of 1851, interest

*218 Fed. 161.

upon such value can be exacted only from the date of the final decree. Several cases are cited in support of this contention, but they are not controlling, because in no one of them did the bond provide for interest and the obligors in a bond conditioned only to pay the stipulated value upon decree could not be liable for interest until the decree fixed their liability. But it is further contended that upon principle, the owners can in no event be held liable for anything beyond the value of the vessel and freight; that therefore the stipulation being for illegal interest is void, being unsupported by any consideration, upon the principle that stipulations given pursuant to law are not enforceable beyond the demands of the law, no matter what promises they may contain. The statement in appellant's brief that section 4 of the act of 1851 (now sections 4284, 4285, R. S. U. S.) says that all claims against the shipowner shall cease from and after the time when he surrenders his vessel, or gives a bond for her value, is not entirely accurate. The statute contains no provision for the giving of a bond. It is only upon a transfer of his interest in the vessel and freight to a trustee appointed by the court that claims against the owner are declared by the statute to cease. It is the 54th rule in admiralty which, presumably for the relief of the shipowner who might wish to put his vessel to some use, provides as follows:

* * * * * *

‘Under this rule the right to elect that he will transfer his interest and thus limit his liability in the way provided by the statute, is expressly reserved to the owner. If, however, he prefers to avail of the alternative offered by the rule, and to substitute the appraised value for the *res*, it is left to the discretion of the court to determine whether such value shall be paid into court in cash, or secured by a bond. If it is paid in cash the fund may be invested and increased by accumulations of income during the continuance of the litigation; and as the fund thus held by the court belongs to the creditors its increment, to the extent of their claims, will also belong to them. Where, however, it is not paid into court, it remains in the hands of the debtor, and for the use of a fund not belonging to him it is but fair and just that

he should pay.' (*The Favorite*, 12 Fed. Rep. 213. In cases therefore where the owner elects not to transfer and asks to be allowed to receive the vessel upon stipulation to pay the appraised value of his interest at some future day, instead of substituting the money for the *res*, it is eminently proper that he should be required to stipulate for interest from the time when he thus releases his ship till the money which takes its place is required for final distribution among the creditors whose fund it is; and there is nothing in either the statute or the rule which expressly or inferentially forbids the court to require him so to do. The additional liability thus incurred arises, not because of the original offense but because the owner has chosen substantially to borrow from his creditors the money which, under the rule, is to take the place of the offending vessel."

It is plain from the foregoing decision that the rule requiring the stipulation to carry interest from its date does equal justice to shipowner and to claimant. It thereby imposes upon the shipowner no greater liability than if he surrendered his vessel as the rule permits, but by requiring the bond to carry interest from its date, it creates for the benefit of the claimants as large a fund as they would have if the vessel were surrendered and sold and the proceeds made to earn interest. Any other rule would work an injustice.

The principle announced in the foregoing case was followed by District Judge Butler in

The Battler, 58 Fed. 704,

wherein, in holding that the stipulation should bear interest on the appraised value from its date, and not from the date of the loss, he said:

"The claim to have interest added to the appraised value of the vessel from time of the sinking of the barges

'Tonawanda' and 'Wallace' to this date cannot be sustained. No case is found in which such a claim was allowed or made. In the *City of Norwich*, 118 U. S. 492, and *The Benefactor*, 103 U. S. 239, there was equal reason for such a claim. The terms of the statute and the rules prescribed in pursuance of it seem to forbid the demand. Assuming that the owners have not forfeited their rights by delay, as I do at present—the question not being raised—they are entitled to a discharge on turning over the vessel or paying her value into court. It is proper, however, that they should provide for the payment of interest on her value until such time as the money is paid, if they prefer to give bond, instead of paying it at present. I have no doubt of the court's power to require this. It was so decided *In re Harris* by the Circuit Court of Appeals (2nd Circuit, 57 Fed. Rep. 243). The petitioners must therefore either turn over the vessel, pay in her appraised value, or enter into stipulation to pay it with interest at such time as it may be required."

The principle was adhered to in

The George W. Roby, 111 Fed. 601.

In that case the steamers "Roby" and "Florida" were in collision on Lake Huron on May 20, 1897. The owner of the "Florida" and the insurers of her cargo libeled the "Roby", whose owner thereupon filed a petition for limitation. The value of the "Roby" was appraised at \$59,300 and bond with surety for that amount was given and the vessel released. Both vessels were held in fault, but the liability of the owner of the "Roby" was limited. The insurer of the "Florida's" cargo appealed upon the single ground that the court below erred in not construing the bond entered into by the owners and insuring the "Roby" as bearing interest from the date of its execution. Upon the

question thus squarely raised, Circuit Judge Lurton said:

“The District Court disallowed interest upon the bond given for the release of the ‘Roby’. The ‘Roby’ was appraised at \$59,300 and a bond with surety executed for that amount by which the owners of the Roby and their surety bound themselves ‘in the sum of \$59,300 unto whom it may concern that the said Lakeland Transportation Company shall abide and answer the decree of the court in said matter, and shall pay into the registry of the court said \$59,300 and the interest on the same as provided by law, the appraised value of the said steamer, whenever such payment shall be ordered and required by the court’. The District Court had undoubtedly authority to require that the owners of the ‘Roby’ as a condition of the release of their vessel should enter into a stipulation to pay the appraised value, either with or without interest when ordered. The authority for the release of a libeled vessel, or for a vessel surrounded upon an application for the benefit of the limited liability act is found in the 54th Admiralty rule. Under that rule the owners of a vessel seeking the benefit of the limited liability statute might convey their vessel to a trustee to be named by the court, or the court might appraise the vessel and require the value to be paid at once into court, or release the vessel upon a stipulation to pay the appraised value into court when ordered. If the appraised value had been at once paid into court the fund might have been made productive by lending it out at interest or by investing it in approved bonds. In such case the fund for ultimate distribution would have been enlarged. As such a course was open to the court, it is clear that it might, as a condition of release upon bond, require that the stipulators’ bond should bear interest from date.”

In

Smith v. Booth, 112 Fed. 553,

District Judge Adams of the Southern District of New York followed *In re Harris*, *supra*, and *The Bat*.

ter, supra, holding that a shipowner should be required to pay interest, not from the date of the disaster, as stated by appellee,* *but upon the value of the vessel as it was at the time of the accident*, and thus necessarily from the date of the bond. This appears from the following:

“The value of the ‘Mary Elizabeth’ was found to have been \$300.00. Upon a settlement of the decree, it is contended by the Lighterage Company that its liability is strictly limited under the act to \$300 and that it cannot be required to pay interest. The act provided, Sec. 4283, ‘the liability of the owner of any vessel * * * shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending’. In case of a surrender of the vessel an exact compliance with the act can be had and the liability of the owner then ceases. Where, however, the owner obtains an appraisalment under the rules, it is established that the *bond to be given should bear interest as a substitute for the benefit a surrender of the vessel would be to those entitled to it*. The precise point here involved has not apparently been decided but it seems clear that a shipowner who resorts to an answer to establish his limitation should not be in a better position than where he surrenders the vessel or gives a bond, and in a case of this kind should be required to pay interest *on the value of the vessel as it was at the time of or immediately after the accident*.”

In the late case of

The Perry G. Walker, 216 Fed. 423,

District Judge Hazel of the Western District of New York held that interest should be paid at the reduced rate of 3% from the date of the filing of the report of the Commissioner fixing the damages. He did not even go back to the date of the filing of the bond.

*Brief, page 22.

The rule requiring the bond to bear interest from its date has been approved by *Benedict* in the following language:

“The shipowner may avoid the payment of interest on claims eventually found valid by the surrender of his interest to the trustee or the payment at once of the appraised value into court. The trustee will sell the *res* surrendered and place the proceeds at interest, and some interest is always received on deposits with the clerk. And the interest so accruing, which is usually not more than two or three per cent, is all of the interest on the claims which will be allowed to claimants. But if the petitioner prefers to retain the *res* and give a stipulation for its value, then the stipulation must include interest on the amount of the stipulation *from its date to the date* of final decree, and in the case of an unsuccessful appeal by the petitioner interest may be decreed against him personally. And this interest will run at the rate usual on stipulations, i. e., six per cent. And where a respondent who is sued personally sets up the defense of limitation of liability, which is sustained, but makes no surrender and gives no stipulation, interest will run against him at the usual rate on the value of the vessel as it was at the time of or immediately after the accident.”

Benedict's Admiralty, Sec. 557.

And

Foster's Federal Practice, Vol. 2, p. 1999,

states the rule to be that

“When a bond or stipulation for value is given, interest runs from the date of the same”.

In two cases

The H. F. Dimock, 77 Fed. 226,

and

The Cygnet, 126 Fed. 742.

following the former, interest was fixed from the date of the decree.

In

The Ocean Spray, 117 Fed. 971,

the accident which gave rise to the litigation occurred on February 12, 1896. The case was tried in the state courts of California and a verdict for \$3000 returned in plaintiff's favor. The California Supreme Court reversed the judgment and remanded the cause for a new trial. While pending in the state court, petition for limitation of liability was filed in the District Court for the Northern District of California. A stipulation for value was given, but it did not bear interest at all.

But one case, viz., that of

In re Starin, 126 Fed. 101,

so far as we are aware, in which the question of interest is discussed, holds that the stipulation for value should bear interest from the date of the loss. It has been contended by appellee that the practice in the District Court for the Northern District of California (but not in the District Court of Oregon) has been to require the bond to carry interest from the date of the loss, but an examination of many cases shows that while some stipulations have so provided, the practice has been by no means uniform.

For instance, in cause No. 13938, wherein the Hammond Lumber Company filed a petition for limitation of liability on November 28, 1908, for an accident occurring in April of that year, *interest was ordered from the date of the filing of the petition*. In *The Corona*, cause No. 13651, the bond bore interest from

its date. In the cases of *The Island Trans. Co.*, *The Coos Bay*, *Rose A. Martinez*, and in *The Progreso*, the bonds carried interest either from the dates of the filing of the petitions or from the dates of the bonds.

The decision in *The Acapulco*, No. 13784, simply enforced the terms of the bond, and did not purport to be based upon any established rule of law.

In *The Ocean Spray*, *supra*, and in *The Americana*, cause No. 15740, where the accident occurred in January, 1913, and the petition for limitation of liability was filed in November, 1914, the bonds did not carry interest at all.

And as for the rules enforced in the District Courts for the Southern and Eastern Districts of New York, the decisions in *In re Harris*, *supra*, and in *Smith v. Booth*, *supra*, show them to provide for interest from the date of the stipulation.

It is true that in the limitation proceedings in the District Court for the Northern District of California, the bonds filed by appellant carried interest from the date of the loss of the raft, but the question of interest was not there in issue and the bonds were made so to provide by the voluntary act of the petitioner.

That the bond for value should not be required to bear interest, except from its date is supported by the rule of reason. The statute (Rev. St. 4283) expressly provides that

“The liability of the owner of any vessel * * * shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending”.

It does not provide that it shall not exceed the amount or value of the interest of such owner in such vessel and interest thereon *from the date of the loss*. Nor does Rule 54 make any provision for interest. On the contrary, it expressly grants to a shipowner the right to transfer his interest in the vessel and freight pending to a trustee to be appointed by the court, or to give a stipulation for the payment into court of the value of the petitioner's interest in the vessel and her freight pending for the voyage. *It makes no reference and contains no requirement as to interest.*

As applied to the present case, appellant could, on the 21st day of July, 1916 (if it had been able to have had both of its tugs within the jurisdiction of the District Court for Oregon), have transferred said tugs to a trustee appointed by the court, and thereupon the court could have directed the sale of the same, and invested the money so as to have earned interest. Manifestly, if the tugs were then of the same value as on the date of the loss (which they were at least), they would have realized \$115,000, and thus the fund from which appellant's claim, if established, could have been paid would have been \$115,000 with whatever interest would have accrued from the date of the investment of the proceeds of the sale. Had the claim as preferred to the Clatsop County court been ultimately allowed, it would have amounted to more than \$140,000, and thus it is obvious that the claim would have exceeded the fund.

In reason, and in the absence of any express provision of either statute or rule, appellant should not have

been placed in any worse position by reason of having accepted and acted upon the alternative method expressly granted to it by Rule 54, by giving a stipulation for value instead of surrendering its tugs. Had the stipulation been required to carry interest from the date of the loss on the appraised value, it is manifest that appellant, by giving the stipulation instead of surrendering the tugs, would have been penalized in the increased amount which it would have been required to pay. Clearly, such a rule would be inequitable.

The only rule which can work exact justice in an enforcement of the rights granted to shipowners by the statute and the Admiralty Rules of the Supreme Court is the one which would require the stipulation for value to carry interest from its date and not from the date of the loss. We submit, therefore, that this court should in that regard follow the uniform rule which has been laid down in the cases already cited.

The fact that the present limitation proceedings were not instituted until five years after the loss of the raft (partly of appellee's making) constitutes no reason why the rule so firmly established by great weight of authority should be set aside. The law authorizes them at any time before satisfaction of judgment.

The Benefactor, 103 U. S. 239.

Appellant made a *bona fide* attempt to maintain a limitation of liability proceeding, and had it not been so vigorously opposed by appellee in its strenuous efforts to prevent the merits of its claim of liability for

the loss of the raft from being determined by the federal courts in their admiralty jurisdiction, appellee's rights would have been long since determined. But appellant's efforts in that regard were defeated by the decision of the District Court for the Northern District of California, and of this court upon the express ground that the value of petitioner's interest in the tugs exceeded the amount of the claim as then made. The moment that appellee increased its claim and made it in excess of the value of appellant's interest in its tugs, the latter invoked the jurisdiction of the federal courts. The fact that petitioner waited for five years before it made a claim sufficient to confer upon appellant the right to federal jurisdiction, was not of appellant's making, and for it appellant should not be penalized by applying a rule contrary to settled authority, which would require it to give a stipulation carrying interest from the date of the loss, and thus place it in a worse position than were it to exercise its right under Rule 54 by surrendering the tugs.

Dyer v. National Steam Nav. Co., 118 U. S. 507, decides nothing adverse to appellant's contention, for it neither held nor intimated that it was proper for the bond to carry interest. When speaking of the allowance of interest on damages, the court was not referring to the stipulation of value as damages.

In reason, we submit, the District Court of Oregon was right in entering an order directing that the stipulation for value carry interest from its date. Thus, claim having been made before the Circuit Court for

Clatsop County in excess of the value of appellant's interest in said tugs, viz., \$115,000, jurisdiction vested on the filing of the petition. The District Court, we submit, should thereupon have proceeded with the trial of the cause and have determined in accordance with the rule laid down by the Supreme Court of the United States in

Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578,

the questions first, whether or not appellant was liable at all for the loss of the raft, and, secondly, if liable whether it had a right to a limitation of liability.

The proceedings in the District Court for the Northern District of California were not pending as against appellee, and the District Court for Oregon erred in holding that petitioner's remedy, if any, was by application in said proceedings.

On the 13th day of January, 1914, the District Court for the Northern District of California, following its decision in the limitation of liability proceedings therein pending, entered a decree in which it ordered, adjudged and decreed "*that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing as against said Hammond Lumber Company by the said petition*"; "*that said Hammond Lumber Company do have and recover its costs herein*"; and "*that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.*"

On appeal this court affirmed the decree of the District Court. Thus it is clear that those proceedings were terminated so far as the present appellee was concerned, *for the affirmed decree of the District Court expressly dismissed the petition as to appellee*. It would seem, therefore, to be beyond argument that said limitation proceedings, at the time of the filing of the petition in the District Court of Oregon, were not pending as against appellee. Whether they were effectually pending as against any other claimant is beside the question for as against the Hammond Lumber Company they were dismissed.

While it is true that the decree provided that it should in no wise affect the rights of petitioner, if any there were, against any other persons entitled to file claims therein, it was ineffectual and cannot be said to have kept the proceedings alive at the time of the filing of the petition herein so as to have made it possible to have brought appellee in by supplemental petition.

In the original petition filed in the District Court for the Northern District of California, appellant (petitioner therein) set forth all of the material facts pertaining to the loss of said raft, including a reference to the suit pending in the Circuit Court for Clatsop County, but it did not allege, as it knew of no facts to justify it, that there might be other claims than that of appellee resulting from the loss of said raft. It prayed, however, for a monition citing all parties to appear in the proceedings, and claimed a right to a limitation of liability as against the same. The monition was issued, and appellee alone presenting a claim,

an order of default was entered as against all the world. And the decision of this court affirming the dismissal of the petition was expressly grounded upon the finding that *it was inconceivable that any claim other than that of the owner of the raft could possibly arise.*

The argument now is that notwithstanding that the denial of appellant's right to proceed in the federal courts in the former proceedings was expressly grounded upon the finding that *it was inconceivable that there could be any other claim than that of the owners of the raft*, the proceedings were pending despite the dismissal, and that the order of default was ineffectual to terminate the proceedings as against all the world other than appellee, because a further decree should have been taken under Admiralty Rule 29, after proof in the District Court that appellant was entitled to a limitation of its liability. In other words, in a case wherein the court found that there could not possibly be more than one claim, and a default had been taken as against all the world other than the one claimant, appellee would apply Admiralty Rule 29, as requiring appellant to go before the District Court and try out *ex parte* the question of its liability for the loss of the raft, and its want of privity therein. The suggestion is positively absurd, and it is inconceivable that this court will entertain the suggestion that the District Court would have undertaken such a hearing.

Admiralty Rule 29 has no reference to limitation proceedings, and no such intended application, but does apply to those cases of default in admiralty causes wherein an affirmative judgment for damages is sought.

Very properly on a default judgment, damages would not be awarded as prayed for in the libel until further proof of the actual loss was made, and this is as far as the rule can be made to go.

Cape Fear Trans. Co. v. Pearsall, et al., 90 Fed.
435,

wherein the court said:

“The default admits all the facts stated in the pleading, but it does not admit the amount of unliquidated damages claimed.”

If the former case was one in which this court's decision was right *because it was inconceivable that there could be any other claim than that of owner of the raft*, and as the proceedings were dismissed as against the only claim that could possibly arise therein, then it will be straining at justice for this court to hold now that those proceedings were effectually kept alive despite their dismissal and the default, so that the Hammond Lumber Company could be brought into them by supplemental petition, at the time the petition herein was filed with the District Court of Oregon. If they were effectually pending, it was not because the District Court for the Northern District of California *anticipated* that the Hammond Lumber Company might increase its demand so as to exceed the value of appellant's interest in its two tugs, *but because of other possible claimants*; and yet if there were other *conceivable* claimants, then the decision of this court was wrong and worked an injustice to appellant when it denied to it the jurisdiction of the federal courts in a proceeding wherein, under those circumstances, it had

the right to be heard. For this court now to hold that the proceedings remained effectual despite the finding upon which it grounded its decision, that there could inconceivably be no other claim than that as against which they were dismissed, then it would be guilty of an inconsistency which manifestly will do the greatest injustice to appellant. If there could conceivably have been any other claim than that of appellee for which those proceedings could be kept alive despite the default, then this court erred in denying to appellant the right to the jurisdiction of the District Court for the Northern District of California which it had invoked. It is not a sufficient answer to say that no showing was made in appellant's first petition of facts which would establish the possibility of other claims, because, unless appellant was willing to allege as a fact something not known to be a fact, it could not truthfully state a knowledge of the possibility of other claims.

And yet, after having successfully induced the District Court for the Northern District of California and this court to deny appellant the right to their jurisdiction, because the case was one in which there could conceivably be no other claims, appellee has now the temerity to suggest to this court that *the proceeding was one in which there might be other claims, "such as fishermen whose nets had been torn by the loosened logs of the raft, and owners of smaller or larger craft which might have been injured by such logs of the raft."**

*Appellee's Brief, page 31.

Appellee is driven to the necessity of this contention to maintain that the former limitation proceedings were still pending, so that appellant should have proceeded therein.

If it were the fact that there was the possibility of other claims, such as appellee now suggests, and of which appellant had no knowledge, then the District Court for the Northern District of California and this court, at the instance of appellee, did an injustice to appellant in the former proceedings because there is no decision in all the legal history of limitation of liability proceedings holding that in a case where there may be a number of claims in excess of the value of the owner's vessel, the right to invoke the jurisdiction of the federal courts will be defeated by the failure of all claimants, other than one of lesser amount than the value of the vessel, to appear and file the claims in the proceedings. It is undeniable that it is sufficient to give jurisdiction to the district court that there be the possibility of more than one claim in excess of the value of the petitioner's interest in his vessel. And if this were not so, then this court would not have made the statement upon which it grounded its former decision in pointing out that the case was one in which there could be by no possibility more than one claim.

For this court to hold now that appellant, if it was to invoke the jurisdiction of *any* federal court in a limitation of liability proceeding as against appellee, was required to proceed in the former proceedings pending in the District Court for the Northern District

of California, wherein it had already given bonds in the sum of \$115,000, with interest from the date of the loss, would manifestly work an injustice to appellant, because it would require it to respond in payment of appellee's claim in an amount greater than the value of petitioner's interest in its said tugs.

To make this clear, let us assume that appellee had increased its claim in the Circuit Court for Clatsop County by amending its complaint so as to have alleged damages in the sum of \$140,000, and thus have eliminated any possible question as to its having made a claim in that amount. If that claim had been made at the time of the trial of the cause in November, 1915, and if this court's decision in the former proceeding was right, then manifestly appellant could not have invoked the jurisdiction of the federal courts in a limitation proceeding until the moment of the increased demand. Under the Admiralty Rules of the Supreme Court, it could have then surrendered its tugs and have limited its liability to their value of \$115,000. On the other hand, if appellant was required to bring appellee into the proceedings pending in the District Court for the Northern District of California, and to respond on the bond which it had previously filed therein, it would be required to pay on appellee's demand of \$140,000, if valid, an amount in excess of the value of its interest in said tugs, for \$115,000, with interest thereon at six per cent. from September 9, 1911, to the date of the enlarged demand, would have increased appellant's liability to over \$140,000. And that is precisely the rule which appellee is seek-

ing to have this court apply in the present instance, for, notwithstanding that under the former decision of this court appellant could never before rightfully invoke the jurisdiction of a federal court in a limitation proceeding, and notwithstanding that the proceeding which it instituted was dismissed as against the Hammond Lumber Company because it was a case in which it was inconceivable that any other claim than that of the owner of the raft could possibly arise, the effect of appellee's contention is to hold that appellant's liability has been enlarged by the amount of interest accumulated since the date of the loss.

If that is to be the rule of law which this court is going to announce, then it will forever lay down a principle which will deny to a shipowner the benefit of the statute which limits his liability to the value of his interest in his vessel. That is exactly what will result in the present instance if appellee's contention is successful as to the actual pendency of the limitation proceedings in the Northern District of California as against appellee. We submit that the contention does not stand the test of reason, and that this court, to be consistent with the position which it took in its former decision, should hold that the limitation of liability proceedings in the District Court for the Northern District of California were finally dismissed as against appellee, and that the District Court of Oregon erred when it held that they were still pending and that appellee should have been brought therein by supplemental petition.

There is nothing in the authorities cited on pages 31 to 43 which cures the error of appellee's present contention.

The decision of this court in

Dodwell et al. v. U. S. Dist. Court for the Northern Dist. of California et al., 139 Fed. 444,

is decisively against appellee's contention, for if the proceedings were therein terminated not only as against those who were before the court, but as against those whose defaults had been entered, although the petition of the steamship company had not in terms been dismissed, then the proceedings in the District Court for the Northern District of California were closed so far as the Hammond Lumber Company was concerned, because as to it *the petition of appellant was expressly dismissed*. This clearly appears in the following excerpt from the opinion of the court:

"The District Court, after having closed up the proceedings in so far as the parties before the court were concerned, and entered its final decree, from which no appeal was taken, had completed its work, and thereafter had no power or authority to 'open up the proceedings' for the purpose of allowing other claimants, who had not appeared therein, to come into the case, have another commissioner appointed to fix the value of the claimants' loss, and determine their rights in that proceeding. *If an action in admiralty is, for any cause, dismissed, it is no longer in court, and the parties thereto are no longer before the court, and its jurisdiction therein is at an end.* The Illinois. Fed. Cas. No. 7003, and authorities there cited.

It is true that *the petition of the steamship company had not in terms 'been dismissed'*, but by the decision of this court it had been declared, under all the facts and

circumstances of the case, to be without merit, and directions were given to the District Court—

‘To enter judgment against the petitioner denying its application for a limitation of liability, and in favor of the respective claimants for the full amount of damages it had heretofore awarded them, with interest and costs.’
In re Pacific Mail S. S. Co., *supra*.

The District Court having followed these directions, and the proceedings having come to an end before the application of these petitioners was made, the District Court properly denied their application.”

Upon appellee’s increasing its demand to an amount in excess of the value of appellant’s interest in its said tugs, the latter not only had the right to invoke the jurisdiction of a federal court, but under Rule 57 of the Admiralty Rules it was required to file its petition in the District Court of Oregon, wherein the action in Clatsop County was pending, because it could only invoke the jurisdiction of other district courts by commencing its proceedings at a time when both of its said tugs, “Dauntless” and “Hercules”, were within the jurisdiction of such court, a condition not capable of accomplishment in the present instance, for its said tugs were engaged upon the high seas.

For the reasons assigned, we submit that the District Court erred in dismissing the petition.

The Circuit Court of Appeals has jurisdiction to review on appeal the decision of the District Court.

The District Court in its memorandum decision decided:

(a) That the petitioner’s remedy, if any, was by an application to the District Court for the Northern

District of California, by supplemental petition or otherwise, to have the Hammond Lumber Company brought in and made a party to the limitation of liability proceedings therein pending;

(b) That those proceedings had been instituted by the petitioner and were still pending in that court at the time the petition was filed;

(c) That the proceedings had been dismissed as to the Hammond Lumber Company on the ground that its claim as then asserted did not exceed the value of the tugs, but that jurisdiction over the proceedings was retained;

(d) That it was within the power of that court to have caused the Hammond Lumber Company to be brought in if it subsequently asserted a claim in excess of the fund;

(e) That such was the petitioner's remedy and not by the commencement of new proceedings in the District Court;

(f) That the claim as made by the Hammond Lumber Company in the state court did not exceed the fund;

(g) That the amount of such claim was to be determined by the state of the pleadings and the amount claimed therein, and not by the estimates or assertions of counsel in an argument based on his construction of the testimony and the law made in a brief after the case had been submitted;

(h) That the action in the state court was to cover unliquidated damages, and interest, as such, is not

recoverable in the state of Oregon on such a demand; and

(i) That the exceptions and motion would be allowed and the petition dismissed.

It is thus manifest that the questions passed upon and determined by the District Court were other than that of its jurisdiction as a federal court to take jurisdiction of the subject-matter. The court's ruling was made upon exceptions which challenged the sufficiency of the facts alleged in the petition to warrant a limitation of liability. The decision of the court not only proceeded upon exceptions in the nature of a demurrer, rather than upon a plea to its jurisdiction as a federal court, but also determined that the District Court for the Northern District of California instead of the District Court of Oregon was the proper court, if any, in which appellant should have proceeded. The questions thus passed upon and determined went to the merits of the petition as stating a right to prosecute a proceeding for limitation of liability in that court, instead of to its jurisdiction as a federal court. This was pointed out by the Supreme Court in the case of

Fore River Shipbuilding Company v. Selma T. Hagg, 219 U. S. 175; 55 L. Ed. 163,

wherein Mr. Justice Day, delivering the opinion of the court, said:

“The court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general

grounds of law or procedure, but of the jurisdiction of the court as a federal court."

It is a settled rule of law that the exclusive jurisdiction of the Supreme Court to review a decision of the District Court is confined to those cases dismissed by a District Court either for want of jurisdiction of the parties, or want of power as a federal court to take jurisdiction of the subject-matter *without* involving the decision of any other question.

The cases which appellee cites in support of its contention were all cases in which the question for review was that of the power of a federal court to take jurisdiction of the subject-matter as a federal court, or where the only question presented for review was on a certificate going to the jurisdiction, without the assignment of other error.

Here, however, error has been assigned to the court's rulings upon matters other than those touching the court's jurisdiction as a federal court. The court passed on matters which went to the merits of the petition, as, for instance, that a claim had not been made in excess of the fund; that the claims were to be determined by the pleadings, and not by the assertion of counsel; that the action in the state court was to recover unliquidated damage, and that the interest on the same was not recoverable in the state of Oregon; that petitioner's remedy, if any, was by an application to the District Court for the Northern District of California; that the proceedings in the latter court were still pending; that jurisdiction over the proceed-

ings has been retained and that it was within the power of the District Court for the Northern District of California to have caused the Hammond Lumber Company to be brought in by supplemental petition, and that such was the petitioner's remedy, and not by the commencement of new proceedings in the District Court for Oregon.

There can be no question but that the District Court for Oregon has jurisdiction of proceedings for limitation of liability in its admiralty jurisdiction, but the questions which it has determined in this cause went far beyond that, for it concededly assumed jurisdiction to determine the matters hereinbefore enumerated. And the errors in those determinations, this court, and this court alone, has the power to review. The controlling rule touching the questions herein involved are considered at length in a comprehensive opinion of the Circuit Court of Appeals for the Third Circuit in

Morrisdale Coal Co. v. Penn. R. Co., 183 Fed.
929, 938,

in which a majority of the Supreme Court decisions bearing upon the subject are exhaustively reviewed. This decision was subsequently affirmed by the Supreme Court in 230 U. S. 304; 57 L. ed. 1494.

The rule was well stated by the Circuit Court of Appeals for the Sixth Circuit in

Olds v. Herman H. Hettler Lum. Co., 195 Fed.
9, 11,

wherein Circuit Judge Denison said:

"The motion calls for the application of well-established rules to circumstances peculiar only in one respect. It is

well settled that, where the only question properly raised on the assignments of error is that of the jurisdiction of the trial court, this court cannot review, but such writ of error must be taken directly to the Supreme Court (*Remington v. Cent. Pac. R. R.*, 198 U. S. 95, 97; 25 Sup. Ct. 577; 49 L. ed. 959; *Coler v. Grainger Co.* (C. C. A. 6) 74 Fed. 16, 21, 20 C. C. A. 267; *Kentucky State Board v. Lewis* (C. C. A. 6) 176 Fed. 556, 100 C. C. A. 208); and also that if the trial court did decide, and if the assignments of error do fairly raise an independent question of general law as well as the question of jurisdiction, then this court has power to hear and decide all the questions. *Boston & Maine R. R. v. Gokey*, 216 U. S. 155; 28 Sup. Ct. 657; 52 L. ed. 1002, and cases cited. See, also, review of decisions in *Morrisdale Co. v. Pennsylvania Co.* (C. C. A. 3) 183 Fed. 929, 938, 106 C. C. A. 269." (Italics ours.)

In *United States v. Larkin*, 208 U. S. 333; 52 L. ed. 517 the writ of error was dismissed, Chief Justice Fuller delivering the opinion of the court, saying:

"District courts are the proper courts of the United States to adjudicate forfeiture and *the question involved was not the jurisdiction of the United States courts as such, but whether this District Court had jurisdiction or the District Court for the Southern District of New York.*" (Italics ours.)

That was precisely one of the questions determined by the lower court when it held that the petitioner's remedy, if any, was by an application to the District Court for the Northern District of California and not to the District Court of Oregon. That ruling is assigned as error and is one which can only be reviewed by this court.

See also *Meeker v. Lehigh Valley R. Co.*, 183 Fed. 548; *National Pole Co. v. Chicago & N. W. Ry. Co.*, 211

Fed. 65; *Smith v. Farbenfabriken of Elberfeld Co.*, 203 Fed. 476; *The Presto*, 93 Fed. 522; *A. J. Phillips Co. v. Grand Trunk Western Ry. Co. et al.*, 195 Fed. 12.

Appellee comments upon the fact that appellant did not assign as error the District Court's consideration of the motion to dismiss, and affidavits submitted in connection therewith.

On the authority of

The Tug No. 16,* 237 Fed. 405,

there seems to be no question but that the court erred in receiving and considering the affidavits, but appellant has not assigned error thereto because it desires to have the case determined by this court upon its merits and not upon technicalities.

We respectfully submit that for the foregoing reasons the District Court erred as assigned, and that its decree should be reversed with instructions to proceed in accordance with the usual practice in limitation of liability proceedings as prescribed by the Admiralty Rules of the Supreme Court of the United States.

Dated, San Francisco,

March 4, 1918.

IRA A. CAMPBELL,

E. B. TONGUE,

SNOW, BRONAUGH & THOMPSON,

MCCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

* This case discusses this court's decision in the former limitation of liability proceedings and upholds the decision on the theory that it was a case in which there could be but one claim.

No. 3070

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY
(a corporation), owner of the steam tugs
"DAUNTLESS" and "HERCULES",

Appellant,

VS.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of Shipowners and Merchants Tugboat
Company (a corporation), owner of the steam tugs
"Dauntless" and "Hercules", for Limitation
of Liability (U. S. District Court,
District of Oregon).

BRIEF ON BEHALF OF HAMMOND LUMBER COMPANY,
CLAIMANT BELOW, APPELLEE.

W. S. BURNETT,

WILLIAM DENMAN,

G. C. FULTON,

Proctors for Appellee.

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BRIEF ON BEHALF OF HAMMOND LUMBER COMPANY,
CLAIMANT BELOW, APPELLEE.

Statement of the Case.

A concise history of this prolonged litigation is set forth in the statement of facts made by Mr. Justice Gilbert in the opinion filed in the proceeding before this

court, wherein Hammond Lumber Company, appellee herein, sought a writ of prohibition against the Judges of the United States District Court for the District of Oregon, to restrain them from further entertaining the very proceeding from which the present appeal has been prosecuted by Shipowners and Merchants Tugboat Company. We refer to that statement of facts. It will be found in 240 Fed. 924 *sub nom. Hammond Lumber Company v. United States District Court for the District of Oregon et al.* Before the court in the prohibition proceeding, annexed to the petition for the writ, were copies of the petition for limitation of the Tugboat Company and the exceptions and claim and answer of the Lumber Company. The present appeal is from the decree of the said District Court sustaining said exceptions, granting the motion of the Lumber Company to dismiss and dismissing the limitation proceeding (Tr. 88, 89).

The motion of the Lumber Company was in the alternative (Tr. 59)—either (a) for dissolution of the injunction theretofore issued against it and the Circuit Court of Clatsop County, Oregon, or (b) in the alternative for dismissal of the petition for limitation as to said Lumber Company, or (c) *in toto*.

As already noted, the court adopted the alternative last mentioned and dismissed the petition *in toto* (Tr. 86).

The motion to dismiss (Tr. 59) supplemented the exceptions (Tr. 28), the latter, of course, being limited in their scope to the allegations contained in the petition for limitation. At the time the exceptions were

filed, the time had not elapsed within which claims might be seasonably filed. When the motion was made, such time had expired and as no other claims than that of the Lumber Company had been filed this was made the first ground of the motion (Tr. 60).

The petition for limitation had omitted to refer to the fact that in the California limitation proceeding the court had required the filing of bonds in the aggregate sum of \$115,000.00, and had required by its order that said bonds carry interest from the date of the disaster, namely, September 9, 1911. These facts were also embodied in the motion, it having been set up in the answer (Tr. 43, 44) and which answer it was noticed would be used upon the motion (Tr. 64).

The motion also set forth in greater detail the California limitation proceeding, incorporating in the moving papers as Exhibit A to the affidavit of the Lumber Company the interlocutory decree of default (Tr. 72-75); and as Exhibit B thereto the opinion of Judge Dooling dismissing the proceedings as to the Lumber Company, but retaining jurisdiction of the proceedings for the protection of the Tugboat Company against any other possible claims (Tr. 76-80), and as Exhibit C thereto the decree of Judge Dooling ordering the dismissal of the proceeding as to the Lumber Company, but expressly providing that such dismissal should in nowise affect the rights of the Tugboat Company, if any, against any other persons entitled to file claims in said proceeding, if any there should be (Tr. 80-81) and as Exhibit D thereto a copy of the dismissal of the California limitation proceeding filed August 2,

1916, after the institution of the limitation proceeding in Oregon, in which the proctors for the Tugboat Company dismissed said California limitation proceeding and the court made an order thereon dismissing such proceeding (Tr. 81-82).

The motion to dismiss set forth as Exhibit E to the affidavit of said Lumber Company, upon which said motion was in part based, the entire portion of the brief of the Lumber Company filed in the State court, from which the Tugboat Company had elaborated its contention that a claim had been made in the said cause last mentioned by the Lumber Company for a total recovery of \$111,153.22, with interest from September 9, 1911, at 6% per annum (Tr. 82-85). The motion further set forth the fact that no claim for anything in excess of \$110,983.13, the amount demanded in the amended complaint in the State court, had ever been demanded by the Lumber Company of the Tugboat Company and attached as Exhibit 1 to said motion the affidavit of the Lumber Company, which in paragraph 2 thereof (Tr. 68-70) sets forth that it was never at any time the intention of the Lumber Company to demand in excess of the sum of \$110,983.13.

Finally the motion was made upon the further ground (Tr. p. 63-64, par. 8) that the Lumber Company, at the suggestion of the Tugboat Company, had stipulated in open court, in the said action in the Circuit Court of Clatsop County, Oregon, that the trial of said action before a jury should be waived and should be before and by the court without the intervention of a jury and that in pursuance of such stipulation and

waiver so made, it was ordered by said court that the cause should be tried and the said cause was in fact tried by the court without the intervention of a jury and that by reason of the premises the Tugboat Company had voluntarily submitted itself in relation to the matters arising or to arise in said action in said Circuit Court for decision and adjudication by said court and had waived its right, if any it otherwise had, to require the Lumber Company to litigate its claim in any other court, or in any other proceeding. This fact was attested to by paragraph 3 of the affidavit of the Lumber Company upon which the motion was in part based (Tr. 70-71).

No affidavits or testimony were filed or offered by Tugboat Company in opposition to the said motion of Lumber Company, so that there was no question of conflict in fact for Judge Bean, who heard the motion, to decide.

Upon the hearing of the motion, the Tugboat Company moved the court to strike from the cause the said motion of the Lumber Company upon the ground that said motion came too late in the proceeding (Statement of Clerk, Tr. p. 6). In his opinion Judge Bean in disposing of the objections to the hearing of the motion thus interposed by the Tugboat Company (Tr. 86) said:

“Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the court over the subject matter and was not waived by a general appearance.”

It should be noted that no error is assigned by appellant upon Judge Bean's ruling last mentioned.

It is our contention that Judge Bean's decree dismissing the limitation proceeding was correct, not only on the grounds specified in his memorandum opinion, but on the other grounds stated in our motion and exceptions, upon each and all of which we now rely. We shall argue herein that in the first place, as held by Judge Bean, no claim has ever at any time been made by Hammond Lumber Company in excess of the amount demanded in its second amended complaint in the State court, to wit: the sum of \$110,983.13; that if in fact a claim greater in amount than \$115,000.00 has been made by the Lumber Company, that the excess of such claim over said sum of \$110,983.13 is for interest accruing on that amount since the date of the creation of that claim, to wit: the date of the disaster, September 9, 1911, and that for the purpose of determining the amount of the claim or claims in a limitation of liability proceeding under the Revised Statutes, in contrast with the amount of the fund, that is to say, the value of the vessel and her freight pending at the time of the disaster, the item of subsequently accruing interest should be ignored—in other words, that the limitation of liability proceeding speaks both as to the value of the *res* and the amount of the claim against the *res*, as of the date of the disaster. We further take the position that if interest arising on claims subsequent to the disaster is to be thus considered, then at least as a matter of discretion, if not otherwise, the value of the *res* should be considered as potentially, if not in fact, carrying a liability (which

may or may not be enforced) for interest. Furthermore, we insist, as Judge Bean held, that the pending limitation of liability proceeding in the Northern District of California, was the proper and only forum and proceeding in which the Tugboat Company could have asserted the rights, if any it had, arising from the making of this alleged claim by Hammond Lumber Company in excess of the value of the *res*. Finally, we submit, for this court's consideration, the question whether this court has jurisdiction to entertain an appeal which presents solely for determination the denial by the United States District Court for the District of Oregon of its jurisdiction to entertain and determine the said limitation of liability proceeding, from the decree dismissing which this appeal is prosecuted. The matter of jurisdiction should logically receive attention at our hands before giving consideration to the merits so called, but inasmuch as we conceive the jurisdictional question is not easy of solution and as its elucidation will come from a consideration of the other matters, we will discuss them first.

At the outset it seems to us there is a question more fundamental than that involved in the "accident", as our opponent would have it, which resulted in the giving of bonds in the California limitation proceeding, which carried interest from the date of the disaster, or the fact (which was no "accident" as far as our opponent is concerned) that the bonds required by Judge Wolverton in the Oregon limitation proceeding did not carry interest.

Considering the question fundamentally, we have to go back of the bond, examine the Revised Statutes, and

determine whether or not, as a matter of substantive law, it was intended to exonerate a shipowner for liability (which might or might not be enforced) for interest on the amount of the claims or claim as determined and limited under said statutes, and in this behalf we contend:

I.

THE REVISED STATUTES OF THE UNITED STATES PROVIDING FOR LIMITATION OF LIABILITY, DO NOT EXONERATE A SHIPOWNER ENTITLED TO THEIR BENEFIT FROM LIABILITY (WHICH MAY OR MAY NOT BE ENFORCED) FOR INTEREST ON THE AMOUNT OF THE CLAIM OR CLAIMS AS SCALED DOWN OR LIMITED BY THE OPERATION OF SUCH STATUTES.

What we have in mind is illustrated by the case of

In re Starin, 124 Fed. 101.

Where the liability of the surety on the bond was limited to his undertaking (which did not provide interest) it was held that while there could not be any recovery against the surety in excess of its contract liability, nevertheless a decree should be awarded against the shipowner for the value of the vessel, plus interest from the date of the disaster.

So far as the writer can find, the only decision of the Supreme Court of the United States on this question is that of

Dyer v. National Steam Navigation Company,
decided May 10, 1886; 30 L. ed. p. 153;
118 U. S. 507, Sub nom. "The Scotland".

This case had at an earlier time been before the

Supreme Court. See *The Scotland*, 105 U. S. 241 (26 L. ed. 1001).

This was not a case where there was a proceeding taken to limit liability and a concourse had of the various damage claimants, but the limitation of liability statute was pleaded as a defense. The finding of the lower court based on the report of the Commissioner was that the amount realized from the strippings of "The Scotland" was \$4927.85. The great question in the case was, whether insurance received by the owners of the "Scotland" should be added to the fund. The trial court held the proper amount to be paid by the owners of the vessel, as depending upon the value of the articles saved, was said sum of \$4927.85 only, and the trial court entered a decree that the owner pay into the registry of the court the said sum of \$4927.85 and the sum of \$2173.10, the costs of the libelants in the District Court and the costs in the Circuit Court and that upon such payment the respondent should be discharged from all liability to the libelants and intervenors.

The libelants excepted to the findings of fact and conclusions of law of the Circuit Court among other grounds on the one that interest should have been allowed on said sum of \$4927.85.

Mr. Justice Bradley, delivering the opinion of the court (four Justices dissenting and referring to their dissenting opinion in the case of *Place v. Norwich & New York Transportation Company*, also known as the "City of Norwich", which has to do with the ques-

tion as to whether or not insurance should be included in the fund) said:

“These points are all disposed of in the previous case of *Place v. National Steam Navigation Company*, except the question of interest. *Were the libelants entitled to interest on the amount received from the strippings?* In answering this question it must be borne in mind that this is not a question of debt, but of damages. The limitation of those damages to the value of the ship does not make them cease to be damages. The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. The record now laid before us contains no part of the pleadings or proceedings in the cause prior to the first decree of the circuit court. We are without any means of knowing the circumstances in the pleadings or the evidence upon which the court was called upon to act, except the bare facts stated in the finding of facts before referred to. The right to a limitation of liability seems to have been denied to the respondent from the beginning. If it offered to pay the value of the strippings into court in its discharge from liability, or desired to do so, it is evident that the court would not allow it to do so, and that the libelants resisted it with all their power. The respondent was obliged to wait until the decision of this court in March, 1882, before getting a declaration of its rights in the matter; and the first move afterwards made was the attempt of the libelants to change the whole form of the controversy by setting up the new claim to the insurance money received by the respondent. Without stopping to decide whether this amendment of the proceedings was lawfully allowed after the decision of this court, it is sufficient to say that the circuit court, so far as we have anything before us to show to the contrary, may have had very good reasons for not allowing interest on the value of the strippings. We are not disposed to disturb its decree in this respect.”

(The italics are our own.)

The statutory basis for the right of a shipowner to limit his liability is found in

R. S., Sec. 4283,

which reads as follows:

“The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.”

It is to be noted in the case last cited, Mr. Justice Bradley squarely holds that the statute does not relieve the shipowner from paying interest *upon and in addition to the value of the vessel*, though he upheld the exercise by the trial court of its discretion in not allowing such interest.

The silence in the Admiralty Rules in the Supreme Court—Admiralty Rules, 54-58—on the question of interest can now be readily understood in the light of this decision. As Mr. Justice Bradley says:

“*The limitation of these damages to the value of the ship does not make them cease to be damages.*”

The vessel and her freight pending is valued as of the close of the voyage, and to this value, as of the close of the voyage, the liability of the owner is limited, but, as the decision says, plus interest, if the court sees fit to allow interest. This case clearly demonstrates that it was never intended that a shipowner should remain supine for four or five years, then surrender

his vessel and thereby escape the payment of interest, though, as this case also shows, it may be a proper exercise of discretion for the court to withhold interest. As the liability is for interest upon the damages as damages (though the damages may be limited to a certain fund or amount), it follows that the date when the damages accrued (the day of the disaster, or close of the voyage, for the purpose of computing the pending freight) is the date from which the interest can be made to run. The whole course of the opinion shows that the question in the court's mind was not as to the date from which the interest should run, but as to whether interest should have been allowed at all in the discretion of the trial court.

From this viewpoint, it will be appreciated that it makes but little substantial difference whether or not the bond carries interest. Liability for interest exists independently of the bond. The bond merely evidences the already existing liability of the shipowner to pay interest, and creates a contractual liability on the part of the surety to pay that interest—should interest be awarded.

In re Starin, 124 Fed. 101, *supra*, exemplifies this.

Nor, as necessarily follows from *In re Starin*, *supra*, is the acceptance of a bond failing to provide for interest an exercise by the court of its discretion as to whether the shipowner shall be relieved of its liability to pay interest.

As the question as to whether the shipowner's liability to pay interest will be enforced in any given case

is one of discretion—naturally, that discretion is best exercised upon or after the trial and not before it.

cf. *The Perry G. Walker*, 216 Fed. 423.

It is, of course, sound practice for courts to require that the stipulation should carry interest from the close of the voyage (as the rules of the Southern and Eastern Districts of New York require (*infra*) unless it is specially ordered to the contrary) for then there is security to satisfy the interest, if it be awarded.

But the point we are making is that the liability (which may or may not be enforced) for interest exists irrespective of the bond, and if the bond does not provide for interest, or only does so from the date of its filing, that matters not so far as the jurisdiction of this court is concerned. The shipowner is liable or possibly liable for interest from the date the damages accrue.

These considerations are not affected by the fact in this case that Hammond Lumber Company has chosen to assert its claim in the State courts of Oregon, under whose statutes interest is not recoverable in such a case. Had the claim been presented in the U. S. District Court either in a limitation of liability proceeding, or in an independent libel, interest would have been recoverable in the discretion of the court from the date of the disaster. Therefore, it follows that from the standpoint of the shipowner, upon whom the statutes confer the right to limit liability, there is always, as the Revised Statutes have been thus construed, a liability, or possible liability (which may or may not be enforced) on his part to pay interest on the

amount of claims as they may be scaled down and limited by the operation of such statutes and it was not the intention of Congress to add to the exceedingly generous treatment accorded shipowners by exonerating the shipowner from his possible liability for interest on the amount of the claim, or claims, as limited. A further development of these thoughts and consideration of decisions in connection with the allowance of interest on the fund in limitation proceedings, will be postponed until we discuss the proposition leading to the result that if interest is to be deemed a part of the claim for the purpose of increasing the amount of the claim, then interest on the fund must or should be considered for the purpose of increasing the fund. We submit, however, that the decision of the Supreme Court of the United States in *Dyer v. National Steam Navigation Company*, supra, discussed in this topic, once and for all refutes the contention of our opponent that the shipowner is entitled under the provisions of the Revised Statutes to exoneration from liability (which may or may not be enforced) for interest from the date of the disaster on the amount of damage claims as thus scaled down and limited. We say this decision is inconsistent with our opponent's contention to the effect that the District Court is powerless under said Revised Statutes and the Admiralty Rules enacted in pursuance of them, to require the shipowner to pay interest on the value of the *res*, or more accurately speaking on the amount of damage claims as limited to the value of the *res*, prior to the time of the commencement of his limitation of liability proceeding.

II.

**THE JURISDICTION FOR THE LIMITATION OF LIABILITY
FOR A SINGLE CLAIM DEPENDS ON THE RELATIVE SIZE
OF THE CLAIM AND THE FUND AT THE END OF THE
VOYAGE AND THE INTEREST ON NEITHER SHOULD BE
CONSIDERED.**

It appears from the petition in the second limitation proceeding in Portland that the principal sum of the claim for damages as finally alleged by the Hammond Lumber Company, in its suit in Clatsop County, is \$110,983.13 (or say \$111,153.92) as of September 9, 1911, the day on which it was sustained. The petition also shows that the value of the fund consisting of the two tugs is \$115,000.00 as of that date.

It is admitted that no other claims were alleged in the second petition to exist, or were filed in that proceeding. It follows that the fund, which, under the decisions of this court must be computed as of the date of the ending of the voyage caused by the disaster, is greater than the damage occasioned by the disaster. The petition therefore, fails to show on its face the presence of jurisdiction for the proceeding, and affirmatively shows the absence of jurisdiction.

The argument that the jurisdiction of the court, so far as it is dependent on the claim exceeding the fund, rests on the state of affairs when the petition for limitation is filed, instead of the time of the disaster, produces several absurdities.

In this case, if the petition for limitation had been filed a month after the disaster and a bond for \$115,000.00, with interest from the date of filing, had

been given, and the Lumber Company had filed its claim for \$111,153.92 and interest for one month, the fund would have exceeded the claim and the jurisdiction would not have existed.

If, however, the petitioner chose to delay filing his petition for limitation for a period of three years, and had then given a bond of \$115,000.00, with interest from the date of filing, and the Lumber Company's claim for \$111,153.92 and interest from the date of the disaster amounted, principal and interest, to \$143,306.96, the claim would exceed the fund and the court would have jurisdiction for limitation. In other words, the petitioner, by his choice of time for filing his limitation proceeding would determine whether or not the court had jurisdiction to limit liability.

Or, take another case: Presume that the fund is \$115,000.00 and interest runs on it at the admiralty rate of six per cent, from the date of the disaster (as it properly should), and suppose that the interest on the damages in a suit brought in the State court runs at the rate of 8 per cent from the same date. Presume that the State court suit goes to judgment at the end of three years for the amount of the claim in the complaint, \$111,153.92, plus interest at 8 per cent. Presume that the Tugboat Company then (as under the decisions it may) files its proceeding for limitation and gives its bond for \$115,000.00, plus interest for three years at 6 per cent. By waiting until the State rate of interest has outrun the admiralty rate sufficiently to make the claim and interest exceed the fund and interest, the petitioner is able to invoke the jurisdiction

for limitation of liability, although it did not exist for over two years after the disaster.

Such a "now-you-see-it and now-you-don't" method of determining jurisdiction must be abhorrent to the court, and the result is equally unjust and senseless, whether the interest on the bond is computed from the day of its filing or from the day of the disaster.

As we show elsewhere in this brief, the interest on the fund, if not from the date of the disaster, is within the discretion of the court. It is quite apparent that this power as to interest, if discretionary, may be exercised by the judge of one district in one way and by another in another. If counsel's contention be correct and interest is to be considered in determining whether the court has jurisdiction, the jurisdiction may exist in one district and not exist in another, all within the discretionary action of the judges of the two districts.

The only sound test is whether the principal sum of the claim, as of the date of the disaster terminating the voyage, exceeds the value of the fund as of the same date. Even in the absence of those decisions of this court which hold that the fund must be computed on the valuation of the vessels at the date of the disaster, the principle we contend for is clear.

These decisions establish that the valuation of the *res* for purposes of determining the fund for limitation is to be as at the moment of the disaster terminating the voyage. In each of them the voyage terminated at a distance from the port of ultimate salvage, in one case the vessel being lodged on a rocky point and in the other lying water-logged many miles from shore

in the open sea. In both cases the vessels were finally salvaged and brought to port, and in each the measure of damage was the salvaged value minus the cost of salvage and minus the risk that the salvage operations would not be successful at all. In other words, the appraisalment was to determine, and did determine the value at the moment of the termination of the voyage by the disaster and at the point of its termination.

Pacific Coast Co. v. Reynolds, 114 Fed. 877;

Boston Insurance Co. v. Metropolitan Redwood Lumber Company, 197 Fed. 703.

It certainly enhances the absurdity of the Tugboat Company's contention that the interest on the fund does not run till the filing of the stipulation when we consider that the fund which is to bear the interest is thus valued as at the termination of the voyage.

III.

THE QUESTION OF INTEREST ON THE FUND IS IRRELEVANT IN DETERMINING JURISDICTION, BUT IF IT WERE THE COURT SHOULD ALLOW THE SUBSTITUTION OF A BOND FOR THE VESSEL ONLY ON THE TERMS OF INCLUDING INTEREST FROM THE END OF THE VOYAGE.

We have shown in our last section that the jurisdiction for limitation should not depend on the allowance or disallowance of interest on the fund. We there suggested that if we do regard the interest as part of the fund in comparing it with the claim, absurd anomalies may arise if the allowance of such interest be discretionary. If discretionary, the court may find, after

all the issues are tried and the facts finally disclosed upon which its discretion shall rest, that interest should be allowed from a date which will make the fund exceed the claim, and the jurisdiction shown not to exist. In other words, the court may lift itself out of its own jurisdiction with its own bootstraps.

The authorities referred to by our opponent are practically conclusive to the effect that the time for which interest should run is a matter of the court's discretion. They certainly do not show it to be the law that the interest *must* run from the time of the filing of the bond, for six of the cases there cited allow interest for other periods or not at all. In fact the Supreme Court has squarely decided that the allowance of interest on the fund is a matter of the trial court's discretion.

The Maggie Smith, 123 U. S. 349 at 356.

In the greatest of the admiralty courts in the United States—those of the southern and easterly districts of New York, this discretionary power has been codified in a rule and that rule provides that the interest *shall run from the end of the voyage*.

“76. The stipulation for value upon such appraisement shall be given with sufficient sureties and upon justification as required under these rules in actions *in rem*, and shall provide for the payment of the appraised amount *with interest from the close of the voyage*, unless otherwise ordered by the court.”

Benedict's Admiralty, 4th ed., page 462;

Benedict's Admiralty, 4th ed., Form of Order for Bond, page 687.

The Tugboat Company has said it knows of only one "reported" case in which interest is allowed from the conclusion of the voyage. In this it is mistaken, however, for in the important case of the San Pedro limitation decided by this court, and in which a member of one of the firms representing the Tugboat Company filed the bond, interest ran on the fund from the date of the disaster and was so reported.

Boston Ins. Co. v. Metropolitan Co., (C. A. A. 9th) 197 Fed. 706.

The end of the voyage has been a favorite time from which to assign the running of interest on the bond.

In the *Acapulco Limitation*, No. 13,784 in the Northern District of California, Judge de Haven, by his order, allowed interest on the bond from the end of the voyage. Later, on the hearing on the final decree, the petitioner objected to this allowance of interest and urged that it run for a shorter period, and the point was fully briefed and argued. Judge Dooling sustained the ruling of Judge de Haven, and the interest was allowed from the earlier date.

In the following limitation proceedings in the Northern District of California, the fund bore interest from the end of the voyage. In each of them the record shows some of our learned opponents participated:

Santa Rosa Limitation, Northern Dist. Cal. No. 15,289;

In re Western Fuel Co., Northern Dist. Cal. No. 13,782;

In re Pacific Coast SS. Co., Northern Dist. Cal. No. 13,787.

No doubt there are other similar cases.

There is above all the precedent in the instant case. It may be that when the Tugboat Company prepared its bond and the order for the court, which the court made requiring a bond which carried interest from the date of the disaster, it did so without giving any particular thought to what may have been the proper practice in the premises, but we submit in view of the court rule prevailing in the maritime districts of the State of New York and with plenty of local precedents in the United States District Court for the Northern District of California in accord therewith, it can hardly be said that the fact that this provision was made for interest was but an accident.

These cases make obvious, what the Tugboat Company had failed to clarify, why it was straining to have the Oregon District Court take jurisdiction. It wanted a chance to persuade Judge Wolverton to make the interest run from the date of the bond and not from the end of the voyage—an uninterrupted chance, *ex parte*. It seems improbable that neither these California cases, nor the New York rule, were cited to the Judge, for he certainly would have desired the affected party to be heard before invoking the statutory injunction.

This is the only instance in the experience of any of those in this brief in which an appraisal for the bond, which ousts the State court, has been had *ex parte*, where there are known claimants. The rules of the Northern District of California codify the long settled

practice that notice of the appraisement shall be given to the known claimants.

“If, instead of a surrender of the vessel, an appraisement thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner, and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement, and notice of the proceedings to appraise the property shall be given to such creditors as the court shall direct, *and to all the attorneys and proctors in such pending suits.*” (Italics ours.)

United States District Court Rules, No. 53.

Such notice is required under the practice as set forth in *Benedict*.

Benedict's Admiralty, 3rd ed., page 343.

It was required by the same rule in the southern and eastern districts of New York.

Benedict's Admiralty, 4th ed., Rule 75, page 462.

In *Smith v. Booth*, 112 Fed. 553, interest was allowed on the value of the vessel from the date of the disaster.

“In *The Favorite* (D. C.), 12 Fed. 213, Judge Blodgett held that the owners might, irrespective of any prior order or stipulation, be required to pay interest upon the value of the vessel from the date of collision, the decree going against the owners and their surety in the stipulation for the value only, there being no provision binding the surety to pay interest before default. * * * Their liability was for the value of the vessel at the time of the collision. Why shall they be allowed the use of that value during a protracted litigation carried on by themselves? The justice of the matter was that the *value at*

the date of collision should be made productive." (Italics ours.)

The George W. Roby, 111 Fed. 601 at 622.

This we think embodies the true principle and evidently the one at the basis of the rule in New York and California. The owner has the use of the vessel and her earned freight from the end of the voyage. He should not be permitted to earn money with the ship and interest on his collected freight moneys and at the same time be allowed (as he is) to delay till the claims have been litigated through the Supreme Court of the United States before commencing his limitation proceedings, and then be permitted to give a bond without interest for this period.

Such a practice is merely putting a premium on delay. Great shipping companies wait till their shippers and passengers or their surviving heirs have almost litigated their claims in the State court and then compel them to try them over again in the limitation proceeding. The result is that poor passengers or their survivors and smaller shippers offer to accept almost any terms rather than face the expense of counsel, the costs and the uncertainties in the double litigation.

It is true that the statute allows the vessels to be surrendered perhaps years after, and it may be that if the vessel is substantially the same with mere ordinary deterioration, the owner need give no more than a bill of sale of her to the trustees. But when the court "acting in equity in admiralty" created an alternative remedy for the surrender, it certainly did so with the

thought that it would exercise the equitable discretionary power as to interest, always a prerogative of the admiralty judge, to prevent any injustice which actual application of the statute might develop. It is a proper term or condition for the granting of the right to keep the vessel and substitute a bond that the bond shall bear interest for the time the owner, by delaying the proceeding has had the use of his freight money and his ship. The court has imposed the costs of the enjoined state proceedings as the terms for allowing a petition to be filed after long delay and the same equitable principle applies to interest.

The S. A. McCaulley, 99 Fed. 302.

If our opponent's contention be correct, and it is the state of affairs at the time of the surrender which controls and not that at the end of the voyage, then the tugs should have been appraised as at that date, and we should have had the benefit of the great rise in shipping values during the war. It is entirely conceivable that these two tugs, if they had been appraised as on the date from which the interest on their value runs, i. e., July 20, 1916, would have been proved worth \$200,000.

Can it be that this was the reason we were given no notice of the appraisement in violation of the long established practice and despite the fact that on the result of that appraisement was determined the question whether or not a State court should be enjoined?

If this was the reason, it was a wrong one, for this court has held in two cases that it is the condition of affairs at the end of the voyage which determines the value of the vessels. These decisions are the more

striking because in each a deduction from the salved value was made for the risk that the damaged vessels might not be salved at all, and this after the deduction for the actual cost of salvage had been made.

Pac. Coast Co. v. Reynolds, 114 Fed. 877;

Boston Ins. Co. v. Metropolitan, 197 Fed. 703.

Every argument of justice and good conscience supports the better California practice and New York rule, and the action of the District Court of California in the first proceeding, in exercising its discretion and allowing interest from the end of the voyage. *But can it be that the court's jurisdiction to enjoin a State tribunal is dependent on such an uncertain and discretionary determination as that of interest on this fund?*

We submit that it is not, and that upon this reasoning, as well as the showing of the other anomalies heretofore in this brief, the jurisdiction must be determined by the relative size of the claim, without interest, to the fund, without interest.

IV.

**HAMMOND LUMBER COMPANY HAS NEVER MADE A CLAIM
AGAINST THE TUGBOAT COMPANY IN EXCESS OF
\$110,983.13.**

In the foregoing argument up to this point, we have assumed that Hammond Lumber Company, through the language used in its brief filed in the State court, had definitely and unequivocally put forward a claim or demand for a sum in excess of \$110,983.13, and we

have striven to show that as such excess over the fund of \$115,000.00 was made up of interest accruing subsequent to the claim, that for the purpose of determining the jurisdiction of the District Court to entertain the proceeding, the amount of the claim thus made up of interest should be disregarded. In this article we contend that Judge Bean correctly decided that Hammond Lumber Company never made a claim in excess of \$110,983.13.

When a controversy has reached the stage of litigation, the pleadings furnish the criterion of the amount of the recovery sought.

It is not pretended that we have at any time in our pleadings prayed or demanded a greater sum than \$110,983.13.

It is argued by the Tugboat Company, since in our discussion in our brief in the State court under the caption of "The Value of the Raft", which entire matter is attached as Exhibit "E" to the affidavit of the Lumber Company used on the motion (Tr. 82-85), we have stated that to such value interest "should be added" that we have *demanded* such interest, even though if it were awarded, the result might be a judgment in excess of the amount of the recovery as limited in our complaint.

It is argued by the Tugboat Company (citing the case of *Rutenic v. Hamaker*, 40 Or. 444; 67 Pac. 192) that the court has power to award interest even though we have not demanded or prayed for it. This seems to prove too much. If that decision be applicable at all

to the case at bar, it seems that our remark in our brief concerning interest bears no causal relation whatsoever to the alleged threatened exercise of the power of the court in awarding interest so as to sanction a recovery in excess of the amount as limited and defined in our pleading, namely, \$110,983.13.

The remark that we "should" have interest falls far short of the dignity of a demand for same. It simply means that to afford the Lumber Company indemnity, it "ought" to have interest. Nevertheless, we are satisfied that under the statutes of Oregon, we are not entitled to interest. But even had we gone further and said we are entitled to interest under the law of Oregon, but we do not ask for it, that would not amount to a claim for interest or demand for interest, and if there be any ambiguity in the remark in our brief, our failure to amend, or seek to amend the complaint, in this respect, resolves that ambiguity.

Again, if there be ambiguity in our remark, we have the affidavit of the Lumber Company on this motion (Tr. 69-70) to the effect that it has never intended to demand, or has demanded, any sum in excess of \$110,983.13, and that it thereby disclaims its right, if any it ever had, to such interest.

Again, if there be ambiguity in our remark, on what just principle should that ambiguity be construed so as to bring about a result which the law will not contemplate was intended by the Hammon Lumber Company? Is it to be presumed particularly against its sworn assertion to the contrary, that the Lumber Company intended to do that which our opponents declare

would defeat the jurisdiction of the court in a case which it instituted and which forum it selected, and the trial of which occupied some three weeks' time—twelve actual trial days? All rules of construction would favor resolving the ambiguity (if such it be) in a manner which would sustain and not defeat the court's jurisdiction. As a matter of construction, it is never presumed that either legislators or courts intend that which contravenes the inherent limitations imposed upon such bodies, and it will not be presumed that a plaintiff litigant intends to do that which throws him out of court. The presumption will be the other way.

Furthermore, is it to be presumed that the Circuit Court of Clatsop County will voluntarily and gratuitously, so far as the Lumber Company is concerned, defeat its own jurisdiction by imposing upon the Lumber Company unasked and unsought a greater recovery than that demanded in the complaint?

The case of *Rutenic v. Hamaker*, 40 Or. 444; 67 Pac. 192, has no application to the situation presented in the case at bar.

This was an action upon an administrator's bond, and the court found, to use the words of L. O. L., Sec. 6028, allowing interest, "that money had been received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied"—a clear case for the recovery of interest as such and as an incident upon the principal amount demanded. The Supreme Court of Oregon affirmed

the action of the trial court in allowing interest on such money so retained, though it was not demanded in the complaint.

The case is inapplicable for two reasons:

(1) If the Lumber Company were entitled to interest in the case at bar, it would not be to interest *as such*, but as an element in the assessing of the entire damages which are limited by the complaint to the sum of \$110,983.13.

(2) Apart from this distinction between interest *eo nomine* recoverable as an incident under the statute, and interest as an element in a measure of damages, the situation must be such as to *entitle* the plaintiff to interest before the court is authorized to grant it.

In a word, it will not be presumed that the court will grant the plaintiff something which it does not ask and to which it is not entitled under the law.

Both these propositions are illustrated in the case of *Sargent v. American Bank & Trust Co.*, 80 Or. 16-38; 156 Pac. 431-433.

It is there said:

“It is true that interest may sometimes be allowed as damages (citing Oregon cases, among them the cases in conversion of *Durham v. Commercial National Bank*, 45 Or. 385-89; 77 Pac. 902, and *Eldridge v. Hoefer*, 45 Or. 239-244; 77 Pa. 874) * * * The right to recover interest *eo nomine* must, in the absence of an agreement to pay interest, be found in the statute which confers it, and unless it is included, it must be deemed to be excluded.”

It is manifest that interest *eo nomine* is not recoverable in the case at bar. The situation presented is not one of those provided by statute. Nor is it recoverable as a component element in a measure of damages under the more recent decisions of the Oregon Supreme Court, owing to the unliquidated and very much controverted character of the demand.

Smith v. Turner, 33 Or. 379; 54 Pac. 166;

Baker County v. Huntington, 48 Or. 593-603; 87 Pac. 1036; 89 Pac. 194;

Hayden v. City of Astoria (May 1, 1917), 164 Pac. 729.

And if it were recoverable as a component element in a measure of damages, the measure of damages we seek to have applied is defined and limited in our complaint to the sum of \$110,983.13—a very different proposition from that where the allowance of interest is a statutory right—a mere matter of arithmetic—which can be readily added to the amount of the demand.

In one case it is a demand which may contain within it the element of interest. In the other case, it is the demand plus interest as an incident added thereto.

V.

THE PENDENCY OF THE FIRST LIMITATION PROCEEDING LEAVES NO JURISDICTION IN ANY COURT FOR A SECOND LIMITATION PROCEEDING. THE LAW CONTEMPLATES BUT ONE LIMITATION PROCEEDING.

The petition in the second limitation proceeding in Portland shows that at the time it was filed there was

pending in the District Court for the Northern District of California, in San Francisco, a first limitation proceeding, in which the same fund had been surrendered, and in which the petitioner sought a concourse of claims and a marshaling of assets for the same disaster.

In this first proceeding a decree entered a default against other possible claimants, such as fishermen whose nets had been torn by the loosened logs of the rafts, and owners of smaller or larger craft which might have been injured by such logs of the raft. The order did no more than enter the default (Tr. 71-75).

Judge Dooling's opinion (Tr. 76-80), which in admiralty is to be read with the decree, provided that:

“The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claimants.”

In this the case differs from *Dowdell v. District Court*, 139 Fed, 444, where the court held that the decree *denying* a limitation ended the case.

The decree provided that the case should be dismissed as to the Hammond Lumber Company's claim, and added the following:

“It is further ordered, adjudged and decreed that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.”

(Tr. 80-81.)

The order for the default was described as “interlocutory” (page 71), a proper description in admiralty

as there must still be a hearing on the merits. Rule 29 of the Supreme Court provides as follows:

“If the defendant shall omit or refuse due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte* and adjudge therein as to law and justice shall appertain.”

In his book on admiralty practice, commenting on Supreme Court Rule 29, Judge Conkling says:

“This rule, it will be remarked, makes no distinction between the case of the defendant’s nonappearance and that of his appearing and omitting or refusing to make due answer to the libel. In neither case, therefore, is the libellant allowed, in the language of the Court of Chancery, to take ‘such decree as he can abide by’; but the court is to ‘proceed to hear the cause *ex parte*, and judge therein as to law and justice shall appertain’.”

2 *Conkling U. S. Admiralty*, page 522.

“It is the indispensable duty of the court to do this.”

Id., page 523.

At the *ex parte* hearing, which, we see, *must* be had after default of claimants in any admiralty proceeding, the judge may draw from the managing owners on the stand, the fact that they were privy to, or had knowledge of the disaster, and hence are not entitled to limitation, or that there are just claims for damage upon which the court may decide against them; or it may appear from their testimony under the examination of the court that there was no privity and no knowledge and no claim.

Whether the final decree shall be for or against the petitioner is as uncertain before this *ex parte* hearing as the granting of a divorce is uncertain after the order defaulting an absent spouse.

Therefore it appears that the first limitation proceeding involving the same fund, the same concurrence of claims, the same marshaling of assets as in the proceeding in Portland was pending when the latter was commenced, and the action here complained of was done by that court.

The Tugboat Company claims that there is an inconsistency between an argument in our brief on the appeal in the first suit, that the order entering the default against all other claims puts the petitioner for limitation in the same position as if the Statute of Limitations had passed on them, and our assertion here that the first limitation proceeding is still pending as to the world. This contention of ours must be considered from the viewpoint of the relationship of the Tugboat Company to the Lumber Company. It was made on an appeal where the only parties litigant were the Tugboat Company and the owner of the raft. For the purposes of limitation, *as to these two parties*, the action of the Tugboat Company in taking the default is an *admission* of the absence of other claimants, which would support the finding of the lower court and its decree in favor of the Lumber Company.

This is very far from saying that the Tugboat Company, by admitting a fact against itself and in favor of the Lumber Company in the jurisdictional contro-

versy between these two, can claim the benefit of the admission *in its favor* and *admit as against the other claimants* that they have no claims or that they shall take nothing by reason of their claims, or that there shall be a limitation as to them.

The question whether the limitation proceeding is still pending in the California District as to the *res* there held, and when the jurisdiction is expressly declared to be retained by the District Court, in spite of the dismissal as to the Lumber Company, cannot be settled by determining what was admitted or claimed between the Tugboat Company and the Lumber Company.

If the facts stated by the Tugboat Company really constitute a new cause of action, any admissions of the Tugboat Company in the first limitation proceeding should be considered when the matter is presented in that proceeding. It would be most extraordinary to hold that the first litigation of the Lumber Company's claim in admiralty did not preclude the consideration of a second claim, and then to hold that the dismissal of the first from the California limitation proceeding prevented the second consideration there.

The first limitation being still pending, the court in California had the exclusive jurisdiction of proceedings for a limitation of liability arising out of this disaster.

1. *In re Whitelaw*, 71 Fed. 733;
2. *Revised Statute*, 4285;
3. *Metropolitan Redwood Lbr. Co. v. Doe*. 223 U. S. 365 at 371 et seq.

Revised Statute 4285 provides that upon the transfer of the vessels to a trustee, all other proceedings shall cease, and this statutory injunction is operative without any writ from the court. The statutory injunction arises upon the giving of a bond as a substitute for the vessels.

Metropolitan Rdw. Lbr. Co. v. Doe, 223 U. S. 365.

The reason for this ouster of these other courts was well stated by this court in the following language:

“The clear meaning and purpose of the law was to fix and declare a certain limit of liability on the part of the shipowners, and to determine whether the vessel is liable at all in a single proceeding, and not to leave it to be litigated, and possibly determined, in different ways in different courts. The prosecution of separate suits, if allowed to proceed, would result in the subversion of the whole object and scheme of the statute.”

Dowdell v. U. S. District Court (C. C. A.), 139 Fed. 444 at 445.

If it be subversive of the act to allow the possibility of litigation of any issues arising out of the voyage in different courts in different ways, then *a fortiori* would it be improper to risk the limitation being denied in the California District Court and allowed by the District Court of Oregon.

If the second proceeding is valid, we have the amusing situation of the first proceeding ousting the second, and the second the first.

An examination of Rules 54, 55, 56 and 57 of the Supreme Court, controlling limitation of liability, shows clearly that but one limitation proceeding is contemplated.

The limitation proceeding pending in California was dismissed (Tr. 82) some days after the institution of the limitation proceeding in Oregon. We are told that this action was merely "for the sake of the record", which we suppose means that a proceeding which this court has held was improperly brought and prosecuted, but which nevertheless served to delay the assertion of the Lumber Company's rights for some three and a half years, should be given a decent burial. We are told that this California proceeding, thus brought to an untimely end, really amounted to nothing anyway, inasmuch as the Lumber Company had been dismissed out of it and a default had been taken against any other possible claimant. Therefore, the proceeding was dead, and the dismissal really was the funeral. If this were sound (which we do not think is the case, and we submit we have shown that the proceeding was very much pending and undertermined) it means that there had been an adjudication against other possible claimants, and it obviously follows that the Tugboat Company was without right to, and it may be doubted if the court had the power to, dismiss said proceeding. A judgment which one person obtains against another may be satisfied, but it never can be dismissed. In a word, we contend the limitation proceeding in California was pending when the limitation proceeding was brought in Oregon. The Tugboat Company contends that the proceeding had reached the stage of a final adjudication. If so, then it could not be dismissed. In any event, it will be conceded that what we have to concern ourselves with is the status of the proceed-

ing in California at the time of the institution of the proceeding in Oregon. We advance these considerations so that our opponent may take comfort from the thought that the result on the merits could not have been any different had he attempted to dismiss the California proceeding before instituting that in Oregon.

There is another reason which points to the necessity for the exclusiveness of the jurisdiction of the District Court which first takes hold of the subject matter. It seems to be conceded on all hands that the concurrent maintenance of proceedings to limit liability over the same subject matter in different districts is unthinkable—even to the point that an inanimate thing, such as “the record”, should be cleared of the suspicion of participating in such a jumble. Let us assume, as might or may well be the case, that the default obtained against the damage claimants in the California proceeding is a valuable right. Let us assume, that the Lumber Company has brought forward a claim which, as of the date of the disaster, is admittedly and vastly in excess of the fund established in the California proceeding. Can it be that the Tugboat Company in order to litigate this claim, in a limitation proceeding, must dismiss the pending proceeding in which the defaults have been obtained? Obviously not, and such being the case it follows, as two concurrent limitation proceedings are unthinkable, that the bringing of the Lumber Company again into the pending limitation proceeding in California was the proper and exclusive remedy of the Tugboat Company, if it desire to assert its right to limitation through the

agency of an independent proceeding in the admiralty court.

In view of the exclusiveness of a proceeding to limit liability, as the one for the adjustment of all claims growing out of the disaster, as sustained by the authorities last cited, and further, having regard to the fact that the institution of such a proceeding and the surrender of the *res*, or its equivalent, the filing of a bond in place of such surrender, thus localizes and limits the litigation of all claims arising out of the disaster to the particular court in which that proceeding is pending and to that particular proceeding, it seems hardly necessary to invoke the principle of election as exercised by the petitioner in a limitation of liability proceeding, to retain for the court, whose aid he has invoked, exclusive jurisdiction over the proceeding thus instituted and the matters arising in it. Nevertheless, it is to be noted that under the Admiralty Rules the Tugboat Company was privileged in the first instance to have instituted its proceeding to limit liability in the United States District Court for the District of Oregon. Indeed this was the district above all others in which the Tugboat Company might most appropriately have proceeded. Its right to do so in California was under the facts in the case conditioned upon the presence within the jurisdiction of the two tugs at the time the petition was filed herein—while in Oregon there was jurisdiction by reason of the fact that the Lumber Company had brought its action in the courts of Oregon.

Benedict on Admiralty, 4th ed., Sec. 530;

In re Louisville, 223 Fed. 185.

Therefore, apart from the more far-reaching considerations already noted, it is obvious that upon the principle of election the Tugboat Company having invoked the jurisdiction of the United States District Court for the Northern District of California, must litigate everything that can be litigated concerning the disaster in that proceeding.

If it has the power to and does dismiss the proceeding in California then it simply means that it is out of court, for all time, so far as respects the maintenance of independent limitation proceedings under the statute. Jurisdiction of the United States District Court in California, or elsewhere, is exhausted.

On another ground the power of the Tugboat Company to dismiss a limitation proceeding which has advanced so far as the proceeding in California may well be questioned. It is to be borne in mind that a petitioner in limitation proceeding is a hybrid—the characteristics of a defendant predominating over those of a plaintiff. In the case of *The Titanic*, 225 F. 747, where on prohibition to the United States District Court the Circuit Court of Appeals for the Second Circuit upheld the right of the trial court to permit damage claimants to withdraw their claims filed in the limitation proceeding, the court said (p. 748):

“We do not think the action of the Oceanic Steam Navigation Company in filing the petition for limitation places these claimants in the position of defendants and therefore in a position where they cannot withdraw their claim. Facts, not theories, should determine the issue, and, as we have shown, the fact is that the claimants are endeavoring to collect of the Oceanic Company damages

sustained by reason of its alleged negligence. On that issue they hold the affirmative and, no matter what name may be given them, are entitled to withdraw the claims if they see fit to do so."

The necessary complement of this proposition is that the petitioner in the limitation proceeding is *pro tanto* a defendant. Not only is he a defendant, but he is such by his own voluntary action. It does not lie in his mouth to say that he may not succeed in establishing that he was without privity or knowledge of the disaster so as to entitle him to limitation of liability. He has turned over his vessel to the court and invited the world to assert their rights to participate in that asset and litigate their claims against him and that asset. *Non constat* but that damage claimants may concede petitioner's lack of complicity in the disaster and his right to limit liability. It, therefore, appears that from this aspect the petitioner's posture is wholly that of a defendant, and if a defendant is entitled to dismiss of his own motion any proceeding in which he is such, then indeed is the millenium at hand or Bedlam let loose, dependent upon one's viewpoint, as the case may be.

If the claim of the Hammond Lumber Company in its final form in the amended complaint, for \$110,983.13, with the mere suggestion in a brief that to afford the Lumber Company complete indemnity interest should be added thereto, although the law says it should not, is to be regarded as a *new* claim, and if (as we believe improper), the interest is a part of the claim for purposes of determining jurisdiction, then the Tug-

boat Company should have caused to be issued a citation to compel us to file this new claim in the existing limitation proceeding in San Francisco, and against the fund created therein, and enjoined the further prosecution of the action pending in the State court. The California District Court would of course have denied the Lumber Company any such relief because, as we have shown, the fund there, on its own theory, exceeded the enlarged claim.

That the District Court in admiralty has the powers of a court in equity for the purposes of fully accomplishing the relief created by the limitation statutes, appears from Judge Gilbert's decision in *Oregon Navigation Co. v. Balfour*, 90 Fed. 298:

"In re Morrison, 147 U. S. 14; 13 Sup. Ct. 246, it was held that the 'proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee, but is an equitable action'. In *Providence & N. Y. SS. Co. v. Hill Mfg. Co.*, 109 U. S. 578; 3 Sup. Ct. 379, 617, it was said that the object and scheme of the statute are to prevent a multiplicity of suits. The proceeding, therefore, is a suit in equity, in admiralty, not to subject property to liens, nor to obtain a personal decree against the owners of the property, but to administer the property which has been invested in the venture through which the injury has occurred, and upon which admiralty liens may have attached therefor, and to apportion it among those who might, on account of the injury, have enforced admiralty liens against the property or have obtained personal judgments against its owner. To accomplish these results and to avoid the dilemma of inferring that congress has passed a law which is incapable of execution, it must be held that the powers of the admiralty in such equitable proceeding are as extensive, and its remedies are as effective, as are the

powers and remedies of a court of chancery where its jurisdiction is invoked in an equitable proceeding.”

Or. Ry. & Nav. Co. v. Balfour, 90 Fed. 295 at 298.

Judge Ross, in an earlier decision of this court, on the nature of the proceeding, says:

“The barge *Columbia*, in respect to which the petitioners sought to limit their liability, not having been surrendered to a trustee, as provided for in section 4285 of the Revised Statutes, the proceeding taken was not a proceeding *in rem*, but a suit in equity (*In re Morrison*, 147 U. S. 14-34; 13 Sup. Ct. 246); and a suit in equity not only for the purpose of limiting the liability of the petitioners, if any liability should be found to exist, but as has been shown, also to have it judicially determined that no liability at all attached to the petitioners by reason of the injuries, damage, and loss mentioned in the petition. The monition issued and published in pursuance of the petition commanded all persons having claims growing out of the matters therein alleged to appear and intervene *pro interesse suo*. 13 Wall. 104; 109 U. S. 591; 3 Sup. Ct. 379, 617. All persons having such a claim or claims are forced by the provisions of the law into the one suit; but when they come into it, each is entitled to set up the facts relied upon by him to make good his claim. Obviously they may, and often do, rest upon separate and distinct grounds. It was so in the present case.”

The Columbia, 73 Fed. 226 at 234.

Certainly, under no theory, is the second limitation proceeding in Oregon justifiable, and any new question legal or equitable should be litigated in the first.

It is submitted, that if the right to increase the claim to above \$115,000.00 by the inclusion of interest (which was not done) was an open question, it should have been thrashed out in the pending limitation proceeding in California.

As indicated on the oral argument, the question of estoppel as between the parties hereto resulting from the steps taken by each in the limitation proceeding in the Northern District of California, can hardly fail to suggest itself to the court. We are satisfied that power remained in the United States District Court for the Northern District of California in the limitation proceeding there pending to enable the Tugboat Company to derive all the benefits conferred under the Revised Statutes providing for limitation of liability, in the event Lumber Company had attempted to create a situation which, had it existed while it was a party to the limitation proceeding in California, would have resulted in its retention in that proceeding. Nevertheless, as an appendix to this brief and merely for the sake of rounding out the argument (for neither the Lumber Company nor the Tugboat Company has ever attempted to work out the relief of a shipowner, who might perhaps be deprived of some of the benefits flowing from said Revised Statutes, in terms of estoppel), we set forth our observations in reference thereto, should the court, of its own motion, deem it of sufficient interest to examine the subject from that viewpoint.

VI.

THIS COURT HAS NO JURISDICTION TO CONSIDER AN APPEAL WHICH PRESENTS SOLELY FOR DETERMINATION A DENIAL BY A UNITED STATES DISTRICT COURT OF ITS JURISDICTION TO ENTERTAIN AND DETERMINE A PETITION FOR LIMITATION OF LIABILITY.

When the Lumber Company sought from your Honors a writ of prohibition to stay the further prosecution of this cause which your Honors are now asked by appellant to determine on the appeal, your Honors refused to issue the writ, among other reasons (240 Fed. 924, 928) on the following grounds:

“Again, the only ground alleged for prohibition is the lack of jurisdiction of the court below, not jurisdiction of the parties, but jurisdiction of the subject-matter. On that question of the jurisdiction alone there would be no appeal to this court. The appeal would necessarily be to the Supreme Court. In *United States v. Sessions*, 205 Fed. 502; 123 C. C. A. 570, the Circuit Court of Appeals for the Sixth Circuit said:

“‘This court has no power, even on error or appeal, to review a decision of the District Court which involves only a question of the jurisdiction of that court. The remedy lies exclusively in the Supreme Court.’”

“That was a case in which mandamus was sought to require a District Judge to dismiss a certain cause from the District Court and remand it to the state court. The Circuit Court of Appeals, in denying its jurisdiction, said:

“‘The right in this court to issue writs of mandamus is incidental to other powers expressly conferred; and it need not be said that, since the power to review simply a question of jurisdiction in the court below does not reside in this court, there is nothing to which the right to issue such a writ can be said to be an incident.’”

The lower court unquestionably dismissed the petition for limitation herein on the ground that it was without jurisdiction in the premises.

As noted in the "Statement of the Case" at the beginning of this brief, upon the hearing of the motion appellant moved the court to strike said motion from the cause on the ground that it came too late (Tr. 6). In his opinion, in disposing of this objection, Judge Bean (Tr. 86) said:

"Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the court over the subject-matter and was not waived by a general appearance."

Judge Bean then says:

"The exceptions and motion will be allowed and the petition dismissed" * * *.

Therefore, whether we are in fact considering a rightful assumption of jurisdiction of the United States District Court and the alleged erroneous determination of the questions of law arising subsequent to the assumption of such jurisdiction, or whether the whole question is one of jurisdiction from beginning to end, it is at least clear that Judge Bean entertained the belief that the matter was wholly jurisdictional and acted accordingly.

In this connection see also Assignment of Error 13 (Tr. 93) which reads as follows:

"The District Court erred in not holding and deciding that it had jurisdiction to proceed to a trial of the issues raised by the petition, claim and answer of Hammond Lumber Company."

Apparently in determining whether the Circuit Court of Appeals or the Supreme Court has jurisdiction of an

appeal, not only is it proper to consider whether in fact the jurisdiction of the District Court as a Federal Court is involved, but even if it is not involved and the District Court itself declined to exercise jurisdiction because *it* thought—even erroneously—that it had no jurisdiction, the ruling of the District Court so made is subject to review in the Supreme Court of the United States and not in the Circuit Court of Appeals.

Thus in *Lehigh Valley Railroad Co. v. Cornell Steamboat Company*, 218 U. S. 264; 54 L. Ed. 1039, the question was as to the jurisdiction of the United States District Court as an Admiralty Court of a libel to enforce contribution arising out of a group of collisions. Libel was dismissed on the ground that the District Court, sitting as a Court of Admiralty, had no jurisdiction to enforce contribution between the parties *on the facts*.

In sustaining the direct appellate jurisdiction of the United States Supreme Court, Mr. Justice Holmes says:

“The first question is whether this court has jurisdiction of the appeal. It is said that the dismissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits (*Fauntleroy v. Lum*, 210 U. S. 230, 235, 52 L. ed. 1039, 1041; 28 Sup. Ct. Rep. 641) and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim, it is of a kind that the admiralty not only ought not to enforce, but has no power to enforce. At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded,

as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Jefferson*, 215 U. S. 130, 138; 54 L. ed. 125, 128; 30 Sup. Ct. Rep. 54."

Of course, it will not be contended that proceedings under the Act of Congress to Limit the Liability of Shipowners, are other than admiralty cases within the meaning of Judiciary Act of March 3, 1891, Section 5. This has already been adjudged.

Oregon Railway & Navigation Company v. Balfour, 179 U. S. 55; 45 L. Ed. 82.

In the case of

The Annie Faxon, 87 Fed. 961,

decided by this court, by Judges Gilbert, Ross and Morrow, it was held by this court that where the substantial and only question presented is as to the power of the District Court to render a personal judgment or decree, in a limitation of liability proceeding, a question of jurisdiction was clearly presented which this court is not authorized to review and the appeal was, therefore, dismissed at the appellant's costs.

In this case, the boiler of the steamer "Annie Faxon" had exploded, killing both passengers and members of the crew. The District Court held that the owners of the vessel were entitled to limit their liability with respect to the claims of all the persons injured and the decree was entered accordingly. An appeal was taken to this court which upheld the limitation of liability in respect of the claims of the employees, but further held

that the claims of the passengers should not be so limited as their right of action arose out of a federal statute concerning the inspection of boilers which right of action the court held was not subject to limitation under the Revised Statutes enacted in that behalf. The cause was remanded for further proceedings and judgments aggregating \$40,000.00 were awarded by the District Court in favor of the passengers and the appeal in question was thereupon prosecuted to this court with the result above noted.

So where the United States District Court for the Northern District of California held that it had jurisdiction to entertain further steps in a salvage suit after a limitation proceeding had been instituted, which involved the disaster in connection with which the salvage services were rendered, the appeal was taken directly to the Supreme Court of the United States and a reversal secured.

Metropolitan Redwood Company v. Doe, 223 U. S. 365.

On the argument herein as to whether this court had jurisdiction to entertain this appeal, counsel for the Tugboat Company in reply thereto merely stated that in his judgment Judge Bean had decided something in addition to a jurisdictional question and that "something" was involved in the present appeal. As we have not been enlightened as to what that "something" is, we are rather at a disadvantage in discussing its characteristics, whether jurisdictional or otherwise. We would invite the attention of this court to the fact that Judge Bean was not called upon to decide between con-

flicting facts—the affidavit in support of the motion to dismiss not being controverted in any way. Nor for that matter do we understand that Judge Bean's final action in dismissing the limitation proceeding would have been any the less a denial by him of the jurisdiction of his court to entertain same, even though he had been required to make and had made findings on conflicting facts.

Hernden-Carter Co. v. Norris, 224 U. S. 496; 56 L. Ed. 857;

United States v. Congress Co., 222 U. S. 199; 56 L. Ed. 163.

As will have been noted from the language of Mr. Justice Holmes in *Lehigh Valley Railroad Co. v. Cornell Steamboat Company*, supra, it is pointed out that inasmuch as all admiralty jurisdiction belongs to courts of the United States as such, in considering whether a jurisdictional question is one which involves the jurisdiction of the Federal courts as such, we are not at all embarrassed by the question which has so often been presented on the law and equity sides of the Federal courts as to whether in a given case the jurisdiction of the court as a Federal court is involved, or whether it is but a question of jurisdiction generally, i. e. a matter which might pertain to the jurisdiction of any tribunal. An illustration of what we mean will be found in the case of

Fore River Shipbuilding Company v. Hagg, 219 U. S. 175; 55 L. Ed. 163,

where the Supreme Court denied that the jurisdiction of a Federal Circuit Court was so involved as to sus-

tain an appeal to the Supreme Court of the United States where the question was whether, under general principles of jurisprudence which would have been applicable alike had the action been brought in a State court, the court should enforce a State statute whose character as a penal statute or otherwise, and, therefore, its enforceability in courts other than those of the forum, was in controversy.

So the objection that complainants had not by their appeal made a case properly cognizable in a court of equity is one which does not put in issue the jurisdiction of a Federal Circuit Court so as to give the Supreme Court appellate jurisdiction to review its decree.

World's Columbian Exposition v. United States,
56 Fed. 654;

Smith v. McKay, 161 U. S. 355; 40 L. Ed. 731.

So a decision of a Federal Circuit Court dismissing a bill on the ground that the remedy was at law and not in equity, does not involve the jurisdiction of that court as a court of the United States, so as to warrant a review of its decision by the Supreme Court of the United States.

Blythe v. Hinckley, 173 U. S. 501; 43 L. Ed. 783.

In considering the question of jurisdiction for the purpose of admiralty appeals, we, therefore, are not vexed by the intermingling of the two forms of jurisdiction, one of which makes the proper appellate tribunal the Supreme Court of the United States, and the other, the Circuit Court of Appeals.

As Mr. Justice Holmes has pointed out,

“all admiralty jurisdiction belongs to courts of the United States as such and, therefore, the denial of jurisdiction brings the appeal within the established rule”.

The same thought is developed and its limitations indicated in

Lamar v. United States, 240 U. S. 60, 64; 60 L. Ed. 526, 528.

Under the Supreme Court decisions just noted and that of this court in the “*Annie Faxon*” supra, for our own part we find it difficult to convince ourselves that this court has jurisdiction of this appeal.

It may at first blush seem strange that this court should have entertained an appeal taken by the Tugboat Company (218 Fed. 161) from Judge Dooling’s decree (212 Fed. 455) dismissing the California limitation proceeding as to the Lumber Company, but, in the first place, it is to be observed that Judge Dooling did not dismiss the proceeding. Indeed he expressly *retained jurisdiction thereof* (Tr. 79, 81), so that rightly or wrongly the question presented to this court to determine was whether he had acted merely erroneously in a proceeding over which he had assumed and still retained jurisdiction. In this connection Judge Dooling (Tr. 79-80) said:

“Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner’s protection does not require that this court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolu-

tion of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claims."

In the second place, in the instant appeal, Judge Bean himself characterized the questions raised by the motion (which included everything brought up by the exceptions and more besides) as going to the jurisdiction of the subject matter, and while invited by the prayer of the motion to merely dissolve the injunction against Hammond Lumber Company, or to dismiss the proceeding as to Hammond Lumber Company, he chose the third alternative and dismissed the entire limitation proceeding.

Finally, apart from what the personal views of the learned trial judge may have been, as evidenced by his opinion and decree, we submit that the two grounds specially mentioned by him in his memorandum opinion for declining to entertain the proceeding, namely, (1) the pendency of the California proceeding which, under the express terms of R. S. 4285, ousted all other courts of jurisdiction and (2) the finding that the Lumber Company had made no claim in excess of the fund—went to the very essence of the jurisdiction of the lower court and that the lower court rightly dismissed the proceeding as one over which it was without jurisdiction.

In conclusion, if this court should hold that it has jurisdiction in the premises, we urge, for the reasons

hereinbefore set forth, that the decree should be affirmed.

Dated, San Francisco,
February 25, 1918.

Respectfully submitted,

W. S. BURNETT,

WILLIAM DENMAN,

G. C. FULTON,

Proctors for Appellee.

(APPENDIX FOLLOWS.)

APPENDIX.

ASSUMING, FOR THE SAKE OF ARGUMENT, THAT HAMMOND LUMBER COMPANY HAS NOW MADE A DEMAND IN EXCESS OF THE FUND ADJUDICATED IN THE CALIFORNIA PROCEEDING, IT MAY BE IT IS ESTOPPED FROM ASSERTING ITS CLAIM TO BE ANY GREATER THAN THE ADJUDICATED FUND.

In our brief, under Topic V, we have given consideration to the nature of the proceeding to limit liability, and concluded that the proceeding brought in the Northern District of California was exclusive as against that instituted in the District of Oregon.

The exclusive and once-and-for-all character of the proceeding to limit liability staying as it does all other tribunals, even the United States District Court itself, where independent libel proceedings involving the disaster have been brought and are pending (*Metropolitan Redwood Lumber Co. v. Doe*, 223 U. S. 365 at 371) suggests that possibly there may have been an adjudication between the parties hereto in that proceeding, which estops each as between themselves, namely: Hammond Lumber Company would be estopped to assert its claim was any greater than the fund then adjudicated, and the Tugboat Company would be estopped to assert that the fund was any less than that adjudicated.

That the estoppel should run against Hammond Lumber Company only to the extent that it is debarred from asserting a claim no greater than the fund, and that Hammond Lumber Company is not limited to the assertion of its claim in the amount presented in that pro-

ceeding, namely, \$71,249.90, *with interest*, is proper when it is borne in mind that no issue was ever tried concerning the amount of the claim, and an amendment to it at any time would have been permitted by that court so long as the amount demanded did not exceed the fund.

Interest upon said sum of \$71,249.90 at the rate of 6% per annum until September 9, 1917 (the sixth anniversary of the disaster) would amount to the sum of \$25,650.00. So even if Hammond Lumber Company were estopped from asserting its claim in an amount in excess of that presented in the California limitation proceeding, on the 9th day of September last the amount of recovery permissible would have been \$96,899.00.

As to the size of the fund, it is proper that the Tugboat Company should be estopped from asserting a fund any less than that adjudicated in the California limitation proceeding. It will be recalled that the appraised value of the tugs was arrived at upon a hearing at which Hammond Lumber Company was cited to appear, was present and offered testimony thereat on the issues as to the value of the tugs, and an order was made by the Commissioner and approved by the court establishing the value of the tugs, and bonds were ordered filed in pursuance thereof, which bonds were by the court made interest bearing from the date of the disaster. All this constituted a final adjudication and determination by the court as to the amount of the fund. With the fund thus in court carrying such interest, petitioner proceeded to publish the monition inviting all the world to present their claims and participate therein, and stayed proceedings thereon in any other tribunal.

We submit that the Tugboat Company should be estopped from at any time asserting that the fund is less than as so adjudicated.

Be this as it may, the extent of the estoppel as to Hammond Lumber Company and as to the Shipowners & Merchants Tugboat Company is a question for the Circuit Court of Clatsop County to determine, when if and as Hammond Lumber Company asserts a claim in conflict with that presented by it in the limitation proceeding in California, and when if and as Shipowners and Merchants Tugboat Company, by proper pleadings in its behalf, presents to the said Circuit Court of Clatsop County, the facts out of which such estoppel arises.

